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THE
Ontario Law Reports

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1929-1930

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JUDGES
OF THE
SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE RIGHT HON. SIR WILLIAM MULOCK, K.C.M.G., P.C., C.J.O.

THE HON. JAMES MAGEE, J.A.

“ “ FRANK EGERTON HODGINS, J.A.

“ “ WILLIAM EDWARD MIDDLETON, J.A.

“ “ DAVID INGLIS GRANT, J.A.

Second Divisional Court.

THE HON. FRANCIS ROBERT LATCHFORD, C.J.

“ “ WILLIAM RENWICK RIDDELL, J.A.

“ “ CORNELIUS ARTHUR MASTEN, J.A.

“ “ JOHN FOSBERY ORDE, J.A.

“ “ ROBERT GRANT FISHER, J.A.

HIGH COURT DIVISION.

THE HON. RICHARD MARTIN MEREDITH, C.J.C.P., President.*

“ “ HUGH THOMAS KELLY, J.

“ “ HUGH EDWARD ROSE, J.†

“ “ WILLIAM ALEXANDER LOGIE, J.

“ “ WILLIAM HENRY WRIGHT, J.

“ “ JOHN MILLAR McEVoy, J.

“ “ WILLIAM EDWARD RANEY, J.

“ “ NICOL JEFFREY, J.

“ “ CHARLES GARROW, J.

*Resigned on the 1st October, 1930.

†Appointed Chief Justice of the High Court on the 2nd October, 1930.

MEMORANDA.

JUDICIAL APPOINTMENT.

On the 2nd October, 1930, the Honourable Hugh Edward Rose, a Judge of the High Court Division of the Supreme Court of Ontario, was appointed Chief Justice of the High Court Division of the Supreme Court of Ontario, with the style and title of Chief Justice of the High Court.

Mr. Justice Rose was appointed Chief Justice in the room and stead of the Honourable Richard Martin Meredith, C.J.C.P., President of the High Court Division, who had resigned.

CALLED TO THE BAR.

17th April, 1930.

Kenneth Borden Palmer (Special—N.B.), John Patrick Mad-den (Special—Sask.), Leo Arthur Doyle (Special—N.S.).

15th May, 1930.

Wilfrid Robert Hobson.

19th June, 1930.

George Arthur Yates, William Fienberg, Maurice Robert Medline, George Frederick Adams, Earl Thomas Caughey, William Herbert Waugh, Jacob Finkelman (with honours), Malcolm Wallace McCutcheon (with honours), James Kenneth Davidson Sims, Richard Becher Hungerford, John Keith McBroom Laird, James Thompson Garrow, Ernest T. Godwin, Roderick Walker Strachan Johnston, Lawrence Melvin Courtice Mason, Fred Beverley Matthews (with honours, Chancellor Van Koughnet scholarship, gold medal), Gordon Caleb Medcalf (with honours, Christopher Robinson memorial, silver medal), Joseph James Minsky (with honours), John Charles Risk (with honours), Bethune Larratt Smith, Harry Alexander Stark (with honours, Clara Brett Martin scholarship, bronze medal), Lester Herbert Clayton, Kelvin David Main Spence, John Frederick Woods, William Mossman Dubrule, Harvey Philip Green, William Skelcher Sewell, James Alexander Metcalfe, Robert Bruce Fulton, Harvie Samuel Balfour, Maurice Shelly Millstone, Adrien E. Richard (Special—N.B.), Edward Lazaresco.

18th September, 1930.

John Wilfrid Teskey, Kenneth Murney Langdon, Crosier Robert Bigelow, Norman Borinsky, Louis Herman, Francis Leo Murphy, Charles Kenneth Waugh, Donald Keith Griffith Black, Samuel Ellenberg, Leonard Wilson Mitchell, Raymond Nicholas Taglietti, Jack Klafer Wahl, Jacob Morris Wainberg, Joseph Jeffery, Douglas Ross Nairn, Morris Prousky, Leonard Clyde Smith, Ben Tepper, Francis Andrew Brewin (with honours), Henry Donald Langdon, Robert Donald Ruddy, Irving Aaron, Richard Ernest Baron Brocklesby, Edson Livingston Maines, Thomas Rutherford Flindall Langdon, Harris Reuben Moscoe, Francis Colenso Powell, Harry I. Rumack, Benjamin Harry Yuffy, Cecil Logue Snyder, Frank Henry MacLatchy, Aurele Parisien, William Edward Earle, George Rowswell Grant Newton, Albert Serre, Leo Sylvestre, Thomas Mackie, John Francis Smith, Malcolm Wallace McCutcheon (with honours), Louis J. Zuker, Nicholas Francis Anthony Scandiffo, John Colin Armour Campbell, Charles Douglas Stewart, George Alexander Snyder, George Argo McGillivray, John Graham Cassels, William Leo Knowlton (with honours), Milton C. Meretsky, Robert Thompson Livingstone Innes, Duncan Brodie McIntyre.

16th October, 1930.

Ross Ryrie, Arthur O'Heir, John Wanless McMaster, Alice Belva Gordon, Harry Fraser Palmer, William Logan Millman (with honours), Rupert Charles McMichael, Aletha Lenore Colter, Charles Frederick Sanderson, David Sylvester Charlton, John Gladstone Currie, George Rondeau Brett, John Wesley Burgess, George Albert Beale, William Anthony Donohue, Charles Stuart Stevenson, Harold Frederick McMullen (with honours), Samuel Nathaniel Goldhar, Charles Everard Wolff, Sherburne Tupper Bigelow (Special—Manitoba), Maurice Gintzler.

ERRATA.

Page 176, head-note, 3rd line, *for "24" read "242."*

" 243, catchwords, 6th line, *for "country" read "county."*

" 320, head-note, 5th line, *for "107" read "109."*

" 361, head-note, last line, *for "S.S.R." read "S.C.R."*

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS.)

[IN BANKRUPTCY.]

RE BARTRAM.

1929.

Dec. 20.

Bankruptcy—Voluntary Assignment by Married Woman not Engaged in Trade—Validity—Bankruptcy Act, secs. 2 (p),(u),(w), 9, 175 Defect in Assignment—Affidavits Sworn before Solicitor for Assignor—Bankruptcy Rules 31 and 168—Sec. 186 of Act—Amount of Creditors' Claims—Motion to Set aside Assignment—Status of Husband of Assignor as Applicant—Amicus Curiae.

A married woman, whether carrying on a trade or business or not, may make a voluntary assignment under the provisions of Part II. of the Bankruptcy Act, and so obtain the benefit which the Act affords to insolvent debtors.

Sections 2 (p),(u), and (w), 9, and 175 of the Act, considered.

Cases under the English Act are not applicable, as that Act contains no provisions relating to voluntary bankruptcy.

In re Gardiner (1887), 20 Q.B.D. 249, and *Re Stone* (1925), 57 O.L.R. 640, considered.

2. Bankruptcy Rule 31 relates to contentious business or business of a like character where there are parties. The affidavit of execution of an assignment under the Act may be sworn to before a solicitor then acting for the assignor. Any defect in that regard may be cured by the application of sec. 186 and Rule 168.
3. In the circumstances of the assignment in this case, the amount of creditors' claims, upon the evidence, exceeded \$500.
4. The above rulings were made upon a motion by the husband of the married woman to set aside the voluntary assignment made by her. It was not open to a stranger to the proceedings to object either as to the affidavit or as to the amount of creditors' claims; but, *semble*, he might as *amicus curiae* draw attention to the fact that the Court was assuming a jurisdiction which, according to his view, it did not possess.

MOTION by the husband of Edith E. Bartram, the bankrupt, for an order setting aside a voluntary assignment, dated the 21st September, 1929, made by her in assumed pursuance of the Bankruptcy Act.

1929.
RE
BARTRAM.

The motion was heard by MIDDLETON, J.A., in Chambers.
W. R. Wadsworth, K.C., for V. T. Bartram, the applicant.
J. M. Mulholland, for the trustee in bankruptcy.
G. T. Walsh, K.C., for the bankrupt.

December 20. MIDDLETON, J.A.:—The motion is made upon three grounds:—

1. That the bankrupt is a married woman, but she does not carry on a trade or business so as to fall within the provisions of sec. 175* of the Bankruptcy Act, R.S.C. 1927, ch. 11.

2. That the assignment is defective because the affidavit of execution and affidavits as to the affairs of the bankrupt were sworn to before a gentleman who was her solicitor and afterwards became solicitor for the trustee in bankruptcy.

3. Because the amount of creditors' claims did not exceed \$500.

There is an obvious preliminary objection to this motion. The husband is a stranger to the proceedings, and I am quite clear that it is not open to him to take either the second or third objection, even if they should be well founded. I am not sure that he may not as *amicus curiæ* draw attention to the fact that the Court is assuming a jurisdiction which it does not possess, if he is right in his view that a married woman cannot make a voluntary assignment under the Bankruptcy Act unless she is carrying on a trade or business.

I am, however, very clearly of opinion that a married woman, whether carrying on a trade or business or not, may make a voluntary assignment under the provisions of Part II. of the Bankruptcy Act, and so obtain the benefit which the Act affords to insolvent debtors. Section 9 of the Act enables an insolvent debtor whose liabilities to creditors, provable as debts under the Act, exceed \$500, to make a general assignment by which the debtor's affairs are placed in the hands of a trustee for ratable distribution among the creditors, the proceedings ultimately leading to the absolution and discharge of the debtor. By sec. 2 (*p*), "debtor" includes any person who, at the time of the authorised assignment, was personally present in Canada," as this woman was. By sec. 2 (*u*), an "insolvent person" includes any person who is for any reason unable to meet his obligations as they gen-

*175. Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the provisions of this Act as if she were a *feme sole*, and for all the purposes of this Act any judgment or order obtained against her, whether or not expressed to be payable out of her separate property, shall have effect as though she were personally bound to pay the judgment debt or sum ordered to be paid.

erally become due. This woman had judgments pronounced against her and she could by no means meet her liabilities. The Bankruptcy Act regards the liability of a married woman as personal as well as proprietary. This appears not merely from the wording of sec. 175, but from the interpretation clause, sec. 2 (*w*). Judgments, as I have said, have passed against this lady for more than the statutory amount, and she appears to be plainly an insolvent debtor coming within the provisions of sec. 9.

In England it has been held that a married woman who is not a trader cannot be put into compulsory bankruptcy under the provisions of the English Act corresponding with our sec. 175, and in *Re Stone* (1925), 57 O.L.R. 640, Mr. Justice Fisher followed these cases.

The English cases form no guide here, as the English Act contains no provisions relating to voluntary bankruptcy. All proceedings under the English Act are compulsory.

The foundation of these English decisions is plain by reference to *In re Gardiner* (1887), 20 Q.B.D. 249. There it is said that the woman who is insolvent but is not a trader cannot be put into bankruptcy under the compulsory provisions, for she does not fall within the section corresponding to 175, which applies only to traders, and declares with respect to a trading woman that her liability is to operate as though she were personally bound, and as to such woman the claim ceases to be proprietary. As to non-trading women it is said (p. 251): "But the judgment obtained here is not a final judgment against the married woman; it creates no personal liability at all, but is a judgment against her property, not against herself." For this reason she cannot be regarded as a debtor.

Here we have no provision which justifies a compulsory bankruptcy against a non-trading married woman, if Mr. Justice Fisher is right, but there is nothing to prevent an insolvent non-trading woman from voluntarily making an assignment under sec. 9. The English Act has no corresponding provision, nor has it a provision corresponding to the interpretation clause 2 (*w*), above referred to, by which the liability under a judgment is declared to be personal as well as proprietary.

The second objection is of no substance. Bankruptcy Rule 31,* upon which it is founded, relates to contentious business or business of a like character where there are parties. I do not think that it has any application to the affidavit of execution made

* 31. No affidavit (other than a proof of debt) shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used.

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Middleton, by the assignor. At that time it cannot be said that there was any solicitor acting for a party.

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The curative provisions of the Act and Rules, sec. 186 and Rule 168, prevent the disastrous and ridiculous consequence of invalidating *ab initio* the entire proceedings by reason of a mistake or slip of this kind.

Finally, there is no doubt that claims existed to an amount sufficient to justify the assignment. It is argued that there were assets which might have been taken by one of the judgment creditors. If these had been taken and had all been retained by the one judgment creditor, his judgment would have been materially reduced, but the assignment intervened, and the creditor never received the money in question. It passed to the assignee for ratable distribution.

The motion completely fails and should be dismissed with costs.

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RE STROUD AND MANDELL.

Dec. 23.

Vendor and Purchaser—Title to Land—Validity and Effectiveness of Proceedings under Partition Act, sec. 4—Absentee—Appointment of Guardian—Right of Possible Wife to Dower—Form of Order—Alleged Defect—Protection of Purchaser—Conveyancing and Law of Property Act, sec. 56.

Section 4 of the Partition Act, R.S.O. 1927, ch. 142, is intended to operate so as to convey the estate and interest of an absentee in lands sought to be partitioned; and, if he is dead leaving a widow, she should be regarded as one entitled to claim under or through him. The lands being sold under the partition order, her claim for dower would be upon the money which would stand in the place of the lands.

If there was any defect in the order made in this case under sec. 4, appointing a guardian to represent the absentee and those claiming under him, sec. 56 of the Conveyancing and Law of Property Act, R.S.O. 1927, ch. 137, made the order of the Court a valid protection to the purchaser.

So *held*, upon a motion under the Vendors and Purchasers Act to determine the validity of the title of the vendor derived under the above-mentioned order.

MOTION by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that the purchaser's objections to the title are without foundation.

The motion was heard by MIDDLETON, J.A., in the Weekly Court, Toronto.

Gordon McLaughlin, for the vendor.

J. A. Sweet, for the purchaser.

McGregor Young, K.C., Official Guardian, for an absentee.

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December 23. MIDDLETON, J.A.:—The question raised upon this application is as to the validity and effectiveness of proceedings by way of partition. The lands in question were vested in a brother and two sisters as tenants in common. The brother, a widower having one child, has not been heard of for more than three years. He departed, leaving his child behind him in the care of the sisters. An application was made on the 8th October, 1929, under the Consolidated Rules, for partition, and upon that application an order was made, under the provisions of the Partition Act, R.S.O. 1927, ch. 142, sec. 4, which provides that where any person interested in the land has not been heard of for three years or upwards, and it is uncertain whether such person is living or dead, the Court, upon the application of any one interested in the land, may appoint a guardian to take charge of the interest of such person and of those who, in the event of his being dead, are entitled to his share or interest in the land.

The statute further provides (sec. 4, subsec. 2) that the guardian shall, in the proceedings, represent such absent person and those who, should he be dead, are entitled to his share and interest in the land, and whether they or any of them are infants or otherwise under disability; and his acts in relation to such share or interest shall be binding on such absent person and all others claiming or entitled to claim under or through him, and shall be as valid as if done by him or them.

No serious objection exists as to the effectuality of the order if the absentee is now living, but the suggestion is made that he may well have married again, and in that case his wife's inchoate right of dower, if he is still living, or her actual right to dower, if he is dead, may not be affected by the statutory proceedings.

No cases are cited, and I have been unable to find any, but I think that the statute was intended to operate to convey the estate and interest of the absentee in the land and that the wife should be regarded as one claiming or entitled to claim under or through him. Her claim would then be converted into a claim upon the money which would stand in the place of the land sold.

Upon the argument before me some suggestion was made that the order appointing the guardian was not technically correct in form. I am not convinced that there is any defect, but I am

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satisfied that under sec. 56* of the Conveyancing and Law of Property Act, R.S.O. 1927, ch. 137, the order of the Court is a valid protection to the purchaser. The objections taken are, I think, unfounded, and an order may be issued so declaring; no costs.

[IN CHAMBERS.]

1929.
 Dec. 28.

REX V. KNOWLES.

Criminal Law — Vagrancy — Magistrate's Conviction—Criminal Code, sec. 238 (f)—Appeal—Forum—Code, sec. 749 (a)—Motion for Discharge of Person Convicted—Return to Writs of Habeas Corpus and Certiorari in Aid—Habeas Corpus Act, sec. 6—Duty of Judge—Evidence of Disturbance in City Street—Sufficiency to Sustain Conviction.

Where a conviction adjudges imprisonment and also imposes a fine and in default of payment of the fine further imprisonment, the appeal under sec. 749 (a) of the Criminal Code is to the Division Court and not to the Sessions.

The defendant was convicted by a magistrate for that he did unlawfully cause a disturbance in a street by screaming and swearing and by impeding and incommoding peaceable passengers, and was thereby a loose and disorderly person and vagrant (Criminal Code, sec. 238 (f)). To writs of *habeas corpus* and *certiorari* in aid, obtained by the defendant, a conviction valid on its face was returned; and, upon a motion for the discharge of the defendant, it was *held*, that, the offence charged being within the jurisdiction of the magistrate, it was the duty of the Judge under the Habeas Corpus Act, R.S.O. 1927, ch. 116, sec. 6, to ascertain whether there was any evidence to sustain the conviction.

The evidence was that there was a disturbance in a main highway of a city, a mob of 300 to 500 unruly persons being there congregated and the defendant being one of the ringleaders of one of the factions. No "peaceable passenger" was called to testify to having been impeded or incommoded, but what was shewn justified the inference that many such passengers must have been inconvenienced by the disturbance in which the defendant took a leading part:—

Held, that there was ample evidence to sustain the conviction.

THREE motions made on behalf of the defendant.

December 20. The motions were heard by MIDDLETON, J.A., in Chambers.

H. J. Macdonald, for the defendant.

W. B. Common, for the Attorney-General for Ontario.

J. C. McRuer, K.C., for the informant.

* 56. An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, whether with or without notice, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice or service.

December 28. MIDDLETON, J.A.:—The three motions made Middleton,
on behalf of the accused were:— J.A.

First, to quash the conviction. Security has not been given 1929.
as required by the statute, so, without more, I dismiss this motion.

Second, a motion for a mandamus to compel the hearing of an REX
appeal from the conviction by the General Sessions of the Peace v.
for the County of York, that Court having refused to hear the KNOWLES.
appeal upon the ground that under sec. 749 (a) of the Criminal
Code the appeal is to the Division Court and not to the Court of
General Sessions of the Peace.

The question depends entirely upon the construction of clause
(a) of the section referred to, which prescribes the court to which
an appeal from a conviction by a justice is to be had. The section
provides that “in the Province of Ontario, when the conviction
adjudges imprisonment only” the appeal shall be had to the
Sessions, “and in all other cases to the Division Court.” The
conviction here adjudges imprisonment, but also imposes a fine,
and in default of payment of the fine further imprisonment. I
think the learned Chairman of the Sessions was right in determin-
ing that this was not a conviction which “adjudges imprisonment
only.” It is difficult to understand why the line should be thus
drawn by Parliament, but no good purpose would be served by
speculation. Possibly this was thought to be a fair distribution
of work between the Judge who presides in the Sessions and the
Judge who presides in the Division Court. In many counties it
is the same Judge who presides in both courts. One might have
expected Parliament to have drawn the line between cases in which
there was a fine imposed, even though on default imprisonment
might follow, on the one side, and place such cases within the juris-
diction of the inferior court and all others within the superior
jurisdiction, but this is not what the law provides.

The third motion is for the discharge of the prisoner upon the
return of writs of *habeas corpus* and *certiorari* in aid. Upon this
motion my jurisdiction is very limited. Unquestionably the offence
charged was one within the jurisdiction of the magistrate, and
there is returned to the *habeas corpus* a conviction valid upon its
face. Under the Habeas Corpus Act, R.S.O. 1927, ch. 116, sec. 6,
it is my duty then to ascertain whether “there is any evidence to
sustain the conviction,” and on examining the evidence I am of
opinion that there is ample evidence to sustain the conviction.

The conviction is that on the 12th October, 1929, the accused
did unlawfully cause a disturbance in a street, road, highway and
public place by screaming and swearing and by impeding and
incommoding peaceable passengers, and was thereby a loose and

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disorderly person and vagrant. The charge was laid under sec. 238 (f) of the Code. The use of the term "vagrant" is perhaps unnecessarily offensive. It is said, in law, to mean an "idle and disorderly person" and for us is so defined by the provisions of the section of the statute in question. Clause (f) brings under this category any person who "causes a disturbance in or near any street, road, highway or public place, by screaming, swearing or singing or by impeding or incommoding peaceable passengers."

On this occasion there was a disturbance, a mob of more or less unruly persons numbering 300 to 500 being congregated upon one of the main highways of the city of Toronto. In the opinion of the magistrate, for which there is evidence, the accused was one of the ringleaders of one of the factions of this crowd. It is said that there is no evidence of any individual having been impeded or incommoded by what took place. It is true that no "peaceable passenger" was called to testify to having been inconvenienced, but ample is shewn to justify an inference that many peaceable passengers upon the streets of the city must have been inconvenienced by this disgraceful performance in which the accused took a leading part.

I am by no means disposed to refine away the statute so as to render it impossible for the police of the city to cope with such a situation as here shewn. I am not in this referring to the question of the supposed right of the police to prohibit speaking upon any subject in parks or other public places, but merely to the situation of disorder and confusion resulting from the unjustifiable action of those resisting the police in the supposed discharge of their duty.

This application also fails and is dismissed. Costs follow the result.

[IN CHAMBERS.]

1929.
Dec. 28.

REX v. KLIG.

Criminal Law—Procedure—Appeal from Conviction for Obstructing Police Officer, contrary to Criminal Code, sec. 168(a)—Notice of Appeal—Condition Precedent—Secs. 749, 750—Forum—Sittings at which Appeal to be Heard—Formal Defects in Notice—Whether Service upon Informant Necessary.

The defendant was convicted by a magistrate of the offence of obstructing a police officer in the execution of his duty, contrary to the Criminal Code, sec. 168 (a):—

Held, that sec. 750 of the Code makes giving due notice a condition precedent to the jurisdiction of the General Sessions of the Peace under sec. 749 to hear an appeal from the conviction.

In this case, a notice of appeal was given in due time; but it, while naming the Sessions as the tribunal appealed to, mentioned a sittings commencing within 14 days as the sittings at which the appeal would be heard, this being contrary to sec. 750 (a). The appeal was in fact set down for the second sittings after the conviction, as required by sec. 750 (a); but the Chairman of the Sessions declined jurisdiction. Before the amendment of the Code by the revised Code, R.S.C. 1927, ch. 36, it was required that the notice should specify "the court appealed to," but that requirement is not in sec. 750 as it now stands:—

Held, that the omission of those words from the section made it plain that the defect in the notice was not vital; no one was misled; a right of appeal should not be killed or hampered by technical objection; and there was a clearly expressed intention to appeal in a notice given within the time limited by the statute.

Held, also, that, the notice being served on the County Crown Attorney and on the magistrate, it was unnecessary under sec. 750 (b) to serve it upon the police officer who laid the information.

THREE motions made on behalf of the defendant.

December 20. The motions were heard by MIDDLETON, J.A., in Chambers.

H. J. Macdonald, for the defendant.

W. B. Common, for the Attorney-General for Ontario.

J. C. McRuer, K.C., for the informant.

December 28. MIDDLETON, J.A.:—This case was argued by the same counsel immediately after the conclusion of the argument in the *Knowles* case, *supra*. In it there are likewise three motions. The disposition of the motion to quash the conviction is similar and for the same reason, no security having been given.

The motion for a mandamus depends entirely upon different considerations. The offence of which the accused was found guilty was obstructing a peace officer in the execution of his duty, contrary to the Criminal Code, sec. 168 (a). The penalty is different, imprisonment for 60 days, no fine being imposed. The Court of General Sessions of the Peace declined jurisdiction in this case, upon the ground that sec. 750 of the Criminal Code makes giving due notice of appeal a condition precedent to the jurisdiction of the Sessions. This I do not controvert, but the serious question is whether the notice that was given was a sufficient compliance with the statutory prerequisites of a valid appeal. The statute provides (sec. 750 (a)) that where a conviction is made more than 14 days before a sittings of the court to which an appeal is

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given, the appeal shall be made to that sittings; but if the conviction is made within 14 days of a sittings the appeal shall be made to the second sittings after the conviction. This does not determine the forum to hear the appeal. That is provided by sec. 749, and here the appeal is given to the General Sessions of the Peace. The giving of the notice of appeal under sec. 750 (b), is, as I have said, a condition precedent. Here a notice was given in ample time, but two defects in it are alleged. The first is that it, while naming the General Sessions of the Peace as the tribunal appealed to, mentions a sittings commencing within 14 days as the sittings of the court at which the appeal will be heard. The appeal was in fact set down and placed upon the list for hearing at the second sittings, as required by clause (a), already referred to. Before the amendment of the statute embodied in the revision of 1927, it was required that the notice should specify "the court appealed to," but this requirement is now omitted. The judgment of the learned Chairman of the Sessions turned entirely upon these words. I am not prepared to agree with him that this meant *the sittings* of the court at which the appeal was to be heard. I think it only required attention to be drawn to the forum to which the appeal was to be had, the statute itself regulating the sittings at which the appeal would be considered. The omission of these words from the section, I think, makes it plain that the defect in this notice is by no means vital. No one was misled. I agree with what was recently said by the learned Chief Justice of the Common Pleas, that "formal obstacles should not be placed in the way of any one who has the right of appeal and that no right of appeal should be killed or hampered by technical objection." The vital thing is that there was a clearly express intention to appeal, lacking in no essential particular, given within the time limited by the statute. That alone may be regarded as a condition precedent, everything else is mere unsubstantial and technical error which may be disregarded.

The second objection to the notice of appeal is that it was not served as required by the statute. What is required is (sec. 750 (b)) that the notice "shall be served upon the respondent and the justice who tried the case." In this case the informant was a police officer. The prosecution was styled "The King v. Myer Klig." The Crown was represented upon the hearing by the County Crown Attorney. Notice was given to the magistrate and to the County Crown Attorney. The objection is that notice was not also given to the informant. I do not think that in this case notice to the police officer who laid the information

is required by the statute. The Crown was adequately notified when the notice was served upon the Crown Attorney. I am told that, although this objection was urged, it was not given effect to by the learned Chairman. If this is so, I agree with him.

The mandamus sought should go directing a hearing of the appeal in the General Sessions.

The third motion should not be considered, as the appellant has his remedy by appeal.

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[IN CHAMBERS.]

REX V. RED LINE LTD.

Appeal—Right of Appeal upon Stated Case from Magistrate's Conviction—Summary Convictions Act, secs. 3 and 13(3)—Criminal Code, sec. 761—Appellate Forum—Divisional Court of Appellate Division.

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Under the combined operation of sec. 3 of the Summary Convictions Act of Ontario, R.S.O. 1927, ch. 121, and sec. 761 of the Criminal Code of Canada, an appeal upon a stated case lies from a conviction by a magistrate.

Rex v. Driscoll (1924), 55 O.L.R. 306, is not now applicable, by reason of the change in the wording of subsec. 3 of sec. 10 of the Summary Convictions Act, R.S.O. 1914, ch. 90, by the Act of 1926, 16 Geo. V. ch. 31, now R.S.O. 1927, ch. 121, sec. 13 (3).

The forum for the hearing of an appeal upon a stated case is a Divisional Court of the Appellate Division.

History of the legislation and review of the decided cases.

AN appeal by the defendant, an incorporated company, from a conviction by the Police Magistrate for the City of Ottawa for an alleged breach of a municipal by-law of that city.

September 30. The motion came on for hearing before ORDE, J.A., in Chambers.

R. H. Parmenter, K.C., for the appellant company,

Redmond Quain, for the private prosecutor, took two preliminary objections to the right of appeal.

December 30. ORDE, J.A.:—The appeal is upon a case stated by the magistrate under the combined operation of sec. 3 of the Summary Convictions Act of Ontario, R.S.O. 1927, ch. 121, and sec. 761 of the Criminal Code of Canada.

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Two preliminary objections were taken by Mr. Quain: first, that no appeal by way of stated case lies at all; and, second, that if it does lie it must be taken to the Appellate Division and not to a single Judge.

Upon the first of these objections, Mr. Quain relies upon the judgment of the late Mr. Justice Ferguson in *Rex v. Driscoll* (1924), 55 O.L.R. 306, where it was held that a proceeding coming to the Court by way of a stated case from a magistrate acting under the combined provisions of the Ontario Summary Convictions Act and the Criminal Code was thereby "removed" into this Court within the meaning of subsec. 3 of sec. 10 of the Summary Convictions Act (then R.S.O. 1914, ch. 90), and that such removal was thereby prohibited; and the appeal was consequently dismissed upon the question of jurisdiction.

If the corresponding provision in the present Ontario Summary Convictions Act were worded in the same way, I might be bound by that decision, and if I disagreed with it (as I do even under the wording of the old provision), my only course would be to refer the appeal to the Appellate Division, in accordance with subsec. 3 of sec. 31 of the Judicature Act, R.S.O. 1927, ch. 88. But it is to be noted that the corresponding provision of the present Summary Convictions Act, namely, subsec. 3 of sec. 13 of R.S.O. 1927, ch. 121, differs from that relied upon by Ferguson, J.A., in the very words upon which his decision rests. The subsection in both Acts is designed to prevent the removal of an order or conviction into the Supreme Court in certain circumstances, but the subsection as worded in the Act of 1914 was completely altered in the Ontario Summary Convictions Act of 1926, 16 Geo. V. ch. 31, which is now chapter 121 of R.S.O. 1927.

The old subsection reads as follows:—

"(3) No such order or conviction shall be removed into the Supreme Court by writ of *certiorari* or otherwise except upon the ground that the appeal provided by any Act under which the conviction takes place or the order is made or by this Act would not afford an adequate remedy."

The learned Judge in *Rex v. Driscoll* held that proceeding by way of appeal upon a stated case constituted a "removal" of the matter into the Supreme Court. It was clearly not so "removed" by *certiorari*, and the only justification for the ruling was that the words "or otherwise" were wide enough to bring such a proceeding within the scope of the subsection. In my view, that theory was erroneous, because the word "removed" must be limited to some procedure akin to *certiorari* whereby the order or

conviction is taken out of the control of the magistrate by some superior power and ought not to have been construed as extending to a proceeding by way of stated case at all. The words "or otherwise" were limited in their meaning, not only by the *ejusdem generis* rule, but by the true meaning of the word "removed." But whether the learned Judge was right or wrong in his interpretation of the subsection is now immaterial, because in its present form, as enacted in 1926 and as part of sec. 13 of R.S.O. 1927, ch. 121, it reads as follows:—

"(3) No such order or conviction shall be removed into the Supreme Court by writ of *certiorari* or motion instead thereof if the defendant has appealed from such order or conviction to any court to which an appeal from such conviction or order is authorised by law or shall be allowed to remove any order or conviction made upon such appeal."

This legislation quite clearly, instead of prohibiting *certiorari* in all cases where an appeal would afford an adequate remedy, merely prohibits it in those cases where the defendant has in fact appealed. The defendant, having chosen one form of relief or method of redress, is thereby precluded from choosing an alternative.

In my judgment the ruling in *Rex v. Driscoll* is no longer applicable.

Upon this branch of his preliminary objections, Mr. Quain further argued that, as the appeal afforded by sec. 13 of the Ontario Summary Convictions Act to the General Sessions or to the Division Court afforded an adequate remedy, the procedure by way of stated case must be deemed to be excluded, both on principle and by the operation of the words "except where otherwise provided" which qualify sec. 3. I do not think that the express provisions in sec. 13 for an appeal to the Sessions and the Division Court, which really merely confirm the right to appeal given under the combined provisions of sec. 3 and of Part XV. of the Criminal Code, can be intended to exclude the alternative procedure by way of stated case, having regard to the fact that for nearly 30 years the procedure by way of stated case under this combined legislation has been recognised and acted upon, except in the *Driscoll* case. Had the Legislature intended to exclude the operation of sec. 761 of the Criminal Code, sec. 3 of the Ontario Act would surely have included that section among those which it expressly excepts from the general inclusion of Part XV. It must be kept in mind that the Summary Convictions Act is applicable to a large number of provincial statutes,

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and that the words "except where otherwise provided" are primarily intended to apply to any special provisions which directly conflict with the operation of Part XV. Had the Summary Convictions Act itself contained some express provision for the stating of a case by a magistrate, then that provision would prevail over the corresponding provision in the Criminal Code. But the Summary Convictions Act must be read as if all of Part XV. of the Code (except secs. 735 and 736) were "enacted in and formed part of this Act." If the Act is read as if sec. 761 of the Code were actually incorporated in it, how can it be said that the remedy by some other form of appeal is to be excluded?

Nor does it follow that the appeal to the Sessions or the Division Court affords an adequate remedy in all cases, because any further appeal is dependent upon the approval of the Attorney-General, whereas when a stated case is obtained the question may as of right get to the highest Court of the Province.

The second objection is that a single Judge has no jurisdiction to hear an appeal from a summary conviction for the breach of a provincial statute taken by means of a stated case, and that the case must go direct to the Appellate Division.

In support of his argument, Mr. Quain refers to sec. 11 of the Judicature Act, R.S.O. 1927, ch. 88, which enacts that "the Appellate Division shall exercise that part of the jurisdiction vested in the Supreme Court which, on the 31st day of December, 1912, was vested in the Court of Appeal and in the Divisional Courts of the High Court."

That section is, of course, a continuation of sec. 12 of R.S.O. 1914, ch. 56, sec. 12, which was itself a continuation of sec. 12 of the Judicature Act of 1913, 3 & 4 Geo. V. ch. 19, by which Act the old Court of Appeal and the Divisional Courts of the High Court of Justice were abolished.

In 1904, by 4 Edw. VII. ch. 11, the Judicature Act as it then stood, R.S.O. 1897, ch. 51, was amended in several particulars. Among the sections so amended was sec. 67, which had dealt with the original jurisdiction of Divisional Courts (including applications for new trials in jury cases) as distinct from their jurisdiction to hear appeals from High Court Judges, which was dealt with by sec. 74.

As sec. 67 stood prior to 1904, no mention was made of stated cases under the Ontario Summary Convictions Act, but the section as re-enacted in that year provides that:

"(1) Subject to rules of Court the following matters shall be heard and determined by a Divisional Court of the High Court

. . . . " (e) Stated cases under the Ontario Summary Convictions Act, and amendments thereto, and under section 900 of the Criminal Code 1892."

This provision remained in effect until the Act of 1913, and there can be no doubt that the jurisdiction so conferred upon the Divisional Courts of the High Court was by that Act vested in the Appellate Division. And it is upon that provision that counsel for the respondent relies.

Mr. Parmenter points to subsec. 2 of sec. 67 as it stood in 1897 and as re-enacted in 1904, which provides that "Nothing in this section contained shall take away or limit the power of a single Judge to hear and determine any proceeding or matter which he has heretofore had power to hear and determine or shall require any interlocutory proceeding heretofore taken before a single Judge to be taken before a Divisional Court." And he also relies upon subsec. 2 of sec. 766 of the Criminal Code, which provides that the authority and jurisdiction of the Court for the opinion of which a case is stated may, subject to any rules and orders of Court in relation thereto, be exercised by a Judge of such Court sitting in Chambers. Section 766 of the Code is dealing with cases stated under sec. 761 thereof, which section corresponds in substance with sec. 900 of the Criminal Code of 1892, and is one of the sections comprised in Part XV. of the present Criminal Code, which, by sec. 3 of the Ontario Summary Convictions Act, R.S.O. 1927, ch. 121, "except where otherwise provided," are made applicable *mutatis mutandis* to cases arising under the Summary Convictions Act.

This question of jurisdiction, as between a single Judge and a higher tribunal, does not seem to have been raised before. There is no reported decision upon it, except *Rex v. Dominion Bowling and Athletic Club* (1909), 19 O.L.R. 107, where the point was not raised, but is mentioned by the Court. Now that it comes up squarely for decision, it must be carefully examined.

It is not necessary to go farther back than 1896 in reviewing the development of the right of appeal by this means. In that year, in the case of *Regina ex rel. Brown v. Robert Simpson Co. Ltd.* (1896), 28 O.R. 231, the Chancery Divisional Court held that, upon the legislation as it then stood, a magistrate had no power to state a case under sec. 900 of the Criminal Code (which is in substance sec. 761 of the present Code) when the conviction was for an offence against a provincial statute. The Ontario Act then in force was ch. 74 of R.S.O. 1887, by sec. 1 of which the procedure for enforcing penalties and punishments under Ontario

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statutes before justices and magistrates was to be the same as that under the statutes of the Dominion of Canada; but, by subsec. 2 of that section, nothing in the section was to affect the procedure upon appeals, which was expressly provided for by later sections of the Act, and also by chapter 75 of the Revised Statutes of that year. The Divisional Court held that proceeding by way of stated case was a form of appeal and was consequently expressly excluded by the terms of subsec. 2, just mentioned.

In the revision of 1897, sec. 1 of ch. 74 of 1887 appears as sec. 2 of ch. 90 and in the same terms.

In 1901, for the first time, the Ontario Legislature introduced the appeal by way of stated case, by sec. 2 of 1 Edw. VII. ch. 13, which amended sec. 8 of the Ontario Summary Convictions Act, R.S.O. 1897, ch. 90, by inserting in the place indicated the words "including the practice and procedure as to the statement of a case for the opinion of the Court." It may be observed in passing that in *Rex v. Henry* (1910), 20 O.L.R. 494, a case before the Court of Appeal, Osler, J.A., at p. 496, expressed some doubt as to this amendment having accomplished its evident purpose of giving jurisdiction to hear appeals by way of a stated case, because the amendment had been by some mistake introduced in the 8th section instead of the 2nd section of ch. 90. That question was not, however, really dealt with by the Court, which merely held that the stated case had been brought to the wrong court, any jurisdiction to hear the appeal being vested in the High Court and not in the Court of Appeal.

The effect of the amendment of 1901 had already been discussed in *Rex v. Ferguson* (1906), 12 O.L.R. 411, where Boyd, C., at p. 412, stated that it was apparently intended to obviate the difficulty raised by the *Robert Simpson* case, and so to make the procedure by way of stated case under sec. 900 of the Criminal Code available for the review of all summary convictions under Ontario law. A short time after the judgment in the *Henry* case, Middleton, J., in *Rex v. Harvey* (1910), 1 O.W.N. 1002, overruled an objection that a magistrate had no power to state a case for determination by a Judge of the High Court, holding that the amendment of 1901 had made secs. 761 to 769 of the then Criminal Code applicable to proceedings before justices under Ontario statutes. In the *Ferguson* case the late Chancellor, sitting alone, merely ordered a magistrate to state a case, but in the *Harvey* case Middleton, J., alone heard and disposed of the appeal by way of stated case. In neither case does it appear that any question was raised as to the power of the High Court being

exercised by a single Judge, and it is odd that in neither case is there any reference to the express provision in 4 Edw. VII. ch. 11, amending sec. 67 of the Judicature Act, that stated cases "shall be heard and determined by a Divisional Court of the High Court."

Section 900 of the Criminal Code of 1892 declared that the Court to which a stated case might be submitted was the Superior Court of Criminal jurisdiction in the Province, and, by subsec. 9, "subject to any rules and orders of Court in relation thereto," the powers of the Court might be exercised by a single Judge sitting in Chambers. It is, I think, reasonably clear that, when the amendment of 1901 first gave jurisdiction to the Ontario Courts to deal with stated cases respecting breaches of Ontario statutes, that jurisdiction could have been exercised by a single Judge of the High Court. But it seems to me to be equally clear that, when the Legislature in 1904, just three years later, declared that the power to hear and determine such cases was to be exercised by a Divisional Court, it must have intended that the recently given jurisdiction should be so exercised. It is quite plain, as I have already stated, that sec. 67 of the Judicature Act, as amended in 1904, was conferring original jurisdiction upon the Divisional Courts, and not merely a jurisdiction to hear appeals from a High Court Judge, appeals of that character (except applications for new trials) being dealt with by sec. 74 as then passed.

Notwithstanding the express provisions of para. (e) of subsec. 1 of sec. 67, it is argued that subsec. 2 thereof maintained the power of a single Judge. I must confess that I am puzzled to know what purpose subsec. 2 was intended to serve. Section 67 deals with many other matters besides stated cases, and there may possibly have been some matters coming under the other heads in which single Judges had theretofore exercised a jurisdiction which it was intended to preserve. But it is not arguable that subsec. 2 could have the effect of taking away the express jurisdiction conferred by para. (e), and it is, I think, equally unarguable that it was intended to confer concurrent jurisdiction upon a single Judge and a Divisional Court.

Had there been, prior to the Act of 1904, a settled practice of bringing stated cases before a single Judge, the argument that that practice was preserved by subsec. 2 of sec. 67 would be stronger, though it would still be difficult to believe that that practice was intended to be continued having regard to para. (2) of subsec. 1. But appeals by way of stated cases are compar-

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actively rare, and I can find no reported case between 1901 and 1904 to indicate that there was any such practice.

The contention of the appellant that in spite of the provisions of sec. 67 a single Judge has jurisdiction by virtue of the combined operation of sec. 3 of the Summary Convictions Act (R.S.O. 1927, ch. 121) and subsec. 2 of sec. 766 of the Criminal Code, is met by the opening words of sec. 3, "except where otherwise provided." An express provision of the Judicature Act that stated cases must be heard and determined by a Divisional Court and now by the Appellate Division would unquestionably modify the provisions of the Criminal Code in this respect.

A somewhat cognate question, involving an appeal by way of stated case in a municipal arbitration, arose in *Re Toronto Railway Co. and City of Toronto* (1921), 51 O.L.R. 351, where the Appellate Division held that under sec. 12 of the Judicature Act of 1914 (now sec. 11 of the Act of 1927) the jurisdiction was vested in the Appellate Division and not in a High Court Judge, and so overruling the earlier decision in *Re McConkey Arbitration* (1918), 42 O.L.R. 380. See also *Re Harmans Ltd. and City of Toronto* (1928), 62 O.L.R. 475, at p. 478.

In *Rex v. Dominion Bowling and Athletic Club* (1909), 19 O.L.R. 107, while no exception to the jurisdiction of a Divisional Court appears to have been taken, the Judges of the Divisional Court there state that the case was properly before that Court by virtue of the Judicature Act amendment of 1904: see pp. 115 and 118.

I am referred to the fact that in *Rex v. Pocock* (1927), 60 O.L.R. 459, my brother Middleton heard and dealt with a case stated by a magistrate under sec. 761 of the Criminal Code, and the provisions of the Ontario Summary Convictions Act. He tells me that no question was raised as to his jurisdiction, which was apparently assumed by both parties.

This preliminary objection as to my jurisdiction has given me some concern, but I can see no escape from the conclusion that a single Judge has no power to deal with the stated case, and that the jurisdiction to do so is vested solely in the Appellate Division.

The appeal will therefore be quashed with costs.

The appellant will doubtless appeal from this ruling, and, as the question upon the merits is one of some importance, will also, if I am upheld on the question of jurisdiction, desire that the Appellate Division may deal with the matter upon its merits; and so the time for carrying the stated case direct to the Appel-

late Division ought to be extended sufficiently to enable this to be done, and the order may so provide.

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January 13, 1930. ORDE, J.A.:—The appellant having taken steps to appeal direct from the magistrate's conviction to the Appellate Division, I direct that the settlement of the order quashing the appeal to myself be stayed until after the final disposition of such appeal by the Appellate Division.

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Feb. 18.

Dower—Application to Dispense with Signature of Wife to Bar Dower in Land of Husband—Dower Act, sec. 13—Wife Living apart under Terms of Separation Agreement—"Such Circumstances as Disentitle her to Alimony"—Refusal of Order—Right of Appeal—Persona Designata.

Where a wife is living apart from her husband, pursuant to the terms of a separation agreement, which does not provide that she shall be disentitled to alimony, and in which there is nothing in the nature of a release or an agreement for a release of dower, it cannot be said that she is so living "under such circumstances as disentitle her to alimony;" and an order dispensing with her signature, for the purpose of barring her dower, to a deed of conveyance of land of the husband, will not be made under sec. 13 of the Dower Act, R.S.O. 1927, ch. 100.

The amendment made by the Dower Act, 1909, 9 Edw. VII. ch. 39, whereby the words "by law" in sec. 12 of the Dower Act, R.S.O. 1897, ch. 164, were dropped, noted, and *Re Tolhurst* (1906), 12 O.L.R. 45, referred to.

Re Lenius, [1923] 2 D.L.R. 1192, a Manitoba case, also referred to. No appeal lies from an order made by a Judge as *persona designata* under sec. 13 of the present Act.

Re King (1899), 18 P.R. 365, followed.

APPLICATION by Grant P. Davidson for an order, under sec. 13 of the Dower Act, R.S.O. 1927, ch. 100, dispensing with the signature of his wife, Gertrude E. Davidson, to a deed of conveyance of certain property in Ottawa, of which he is part owner, on the grounds that she has refused to concur in the conveyance, for the purpose of barring her dower, and that she has been living separate and apart from him for upwards of two years under such circumstances as disentitle her to alimony.

The application was heard by KELLY, J., in the Weekly Court, Ottawa.

W. D. Hogg, K.C., for the applicant.

G. F. Henderson, K.C., contra.

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February 18, 1929. KELLY, J.:—The applicant's affidavit sets forth that he and his wife were married on the 26th December, 1911, and lived together for several years, and that, having separated in 1926, negotiations for a separation agreement were begun and an agreement was arrived at on the 23rd December, 1926, since which time they have continued to live separate and apart from each other. The agreement is produced: it provides that the parties shall live separate and apart from each other, and neither of them shall molest, annoy, or interfere with the other in any manner whatsoever. Provision is then made in regard to the support and maintenance of the wife and their two children, and for the disposal of certain policies of insurance upon the life of the applicant, with a covenant by him to execute forthwith a will which shall provide that the terms of the agreement shall be carried out by his executors, and that he will not revoke any provisions affecting the wife or his children without first obtaining her written consent. There is a term as to what shall happen in the event of the death of the applicant and the remarriage of his wife; and provision is also made looking to the prospect of either party obtaining a divorce.

There is conflict in the affidavit evidence as to the observance of the agreement, the wife swearing that the applicant has failed to fulfill some of its terms; he swearing to the contrary. To this I shall refer later on.

The position taken by the applicant is that the making of the agreement already referred to disentitles his wife to alimony. There is a marked distinction, however, between cases where, on the one hand, a wife is living apart from her husband by contract, and cases, on the other hand, where she has voluntarily abandoned or deserted her husband, or where she has been guilty of unchastity or other such reprehensible conduct. It is not urged or set up as a ground for this application that his wife has abandoned or deserted the applicant or that she has been guilty of any such misconduct.

The trend of opinion of the Courts has been that the wife's right to dower shall not lightly be interfered with, or in other words that she shall not be deprived of that right except in a clear case against her. In the present case what the wife expressly contracted to do was to live apart from her husband and not to molest, annoy, or interfere with him in any manner whatsoever. There is nothing in the nature of a release or an agreement for a release of dower. If it was the intention of the parties that her right to dower was to be determined at the time of the separation agreement, it surely would have been so provided therein. If, on the

other hand—and this is more to the point, as the making of the order depends in this case on whether she has been living apart from her husband under circumstances disentitling her to alimony—it was intended that she should by that agreement disentitle herself to all future claims to alimony under any circumstances, why was that not expressly provided for? In my opinion the agreement has not that effect.

I have been unable to find any decision on the exact point, under the statute in the present form. The head-note of *Re Tolhurst*, 12 O.L.R. 45, decided in 1906, states:—

“A husband whose wife has been living apart from him for two years, and who for valuable consideration has released and discharged him from all claims for alimony present and future, is not entitled, under sec. 12 of R.S.O. 1897, ch. 164, to an order dispensing with the concurrence of his wife to bar her dower in a conveyance, for although barred by contract from claiming, she cannot be said to be living apart ‘under such circumstances as by law disentitle her to alimony.’”

It will be noticed that in that section the language is “under such circumstances as *by law* disentitle her to alimony.” In the Dower Act, 1909, 9 Edw. VII. ch. 39, repealing the former Act, the words “by law” in sec. 12 of the former Act were dropped, that section (numbered 14 in the new Act) otherwise remaining in the form in which it appears in sec. 13 of the present statute, R.S.O. 1927, ch. 100. In another respect the *Tolhurst* case was stronger against the wife’s rights than the present case, for there for valuable consideration the wife expressly released and discharged her husband from all claims for alimony past and present. Here there is no such release or discharge. In the circumstances which are now before me, I do not think that the dropping from the section of the words “by law” militates against the position taken by the wife. Living apart from her husband, under a contract such as these parties entered into, is not of itself living apart under circumstances disentitling her to alimony. It merely shews that, the wife being entitled to alimony, the parties themselves have, for the time being, fixed as maintenance a definite amount in a definite manner. But these are not circumstances within the meaning of the statute disentitling her to alimony. The circumstances which the statute intends shall disentitle the wife to alimony (if she has been living apart from her husband) are of an essentially different kind, as I have already pointed out.

I state my conclusion that the applicant is not entitled to the order only after careful consideration, realising the importance of what is involved, and the care which should be taken lest an

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Kelly, J. irretrievable wrong be done. The application is dismissed with costs.
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I have not thought it necessary to discuss the contention of Mr. Henderson based upon the consequences and effect of a breach by the husband of terms of the contract—which Mr. Henderson contends has occurred—in respect of which he cited several English cases such as *Bishop v. Bishop*, [1897] P. 138; *Diggins v. Diggins*, [1927] P. 88; *Dewe v. Dewe*, [1928] P. 112. If the applicant has committed a breach of his agreement the decisions in these cases will be found valuable. The parties are in conflict as to whether there has been committed a breach by the applicant, particularly in respect of the supply of coal and light for the residence now owned by the wife and referred to in the agreement of the 23rd December, 1926, in which the applicant agreed to pay for all fuel and light required for that house so long as it remains the property of his wife—not so long as she occupies it. It is common ground that Mrs. Davidson, about a year ago, rented the house to a tenant at a monthly rental. The applicant swears that the tenant supplies his own fuel and light, and he considers he is under no obligation to pay his wife the value of the fuel and light, as she has not been in occupation of the house. It is easily conceivable however that if he had continued to pay for the fuel and light, thus relieving the tenant from that expense, the rental value to Mrs. Davidson would be greater than the rent she now receives. In that sense the applicant has not lived up to his agreement.

Though not a binding authority, I refer to an interesting case, *Re Lenius* decided by the Court of Appeal of the Province of Manitoba, reported in [1923] 2 D.L.R. 1192. That arose under the Manitoba Dower Act, 1919, 9 Geo. V. ch. 26. Section 11 thereof states that where the wife of the owner of a homestead has been living apart from him for two years or more and the owner is desirous of making a disposition of the homestead free from her rights under the Act, an order may be made, in the manner therein set out, dispensing with her consent. The decision as set out in the head-note of the report is that “the fact that an order has been made by the Court entitling a husband and wife to live separate and apart from each other on such terms as they may determine, and a separation deed is executed by which they agree that they ‘will henceforth live separate from each other, and neither of them will take proceedings against the other for restitution of conjugal rights or molest, annoy, or interfere with the other in any manner whatsoever,’ does not disentitle the wife, who has lived separate from her husband in accordance with the separation deed, to her right to dower under the Manitoba Dower Act,

1919, ch. 26, sec. 20, in her husband's property upon his death." In the reasons for judgment the Court expresses the opinion that what the Legislature had in view was that if the wife, on her own initiative, elects to abandon or desert her husband, she shall then be taken to have forfeited her rights in his property; but, if she lives apart from her husband under an agreement between them, she surely cannot be said to have left or abandoned him within the meaning of the section there referred to.

At the close of the argument it was suggested that leave to appeal should be given to the unsuccessful party. Had I the right to grant such leave, I would readily do so because of the importance of the question involved in the motion. I have no such power however. I find this statement of the late Sir William Meredith in his reasons for judgment in *Re King* (1899), 18 P.R. 365, at pp. 366-7, repeated by Mr. Justice (now Chief Justice) Anglin in *Re Tolhurst*, 12 O.L.R. at p. 46:—

"Inasmuch as an order made under sec. 12 is made by the Judge as *persona designata*, and is not subject to appeal, and the wrong done by an improvident order would probably in many cases be irremediable, great care should, I think, be taken, in the exercise of the large and exceptional power conferred by the section, to ascertain that the case made by an applicant comes clearly within its provisions."

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Jan. 2.

Broker—Customer's Shares Pledged to, for Specific Purpose—Repledge to Bank as Security for Broker's General Indebtedness—Bankruptcy of Broker—Contest between Trustee and Customer—Right of Customer to Re-delivery of Shares Free from Claims of Broker's Creditors—Shares of other Customers—Contribution—Subrogation.

A stockbroker, having in his possession shares belonging to a customer, pledged to him for a specific and definite purpose, has no right, in the absence of agreement with the customer, or some established custom binding upon the customer, to repledge the shares for more than the amount due to him (the broker); and where there has been such a repledge the customer is entitled, as against the broker's creditors, to the re-delivery of the shares (which have not been disposed of by the bank) free from any claim of the trustee in bankruptcy of the broker's estate.

Connec v. Securities Holding Co. (1907), 38 Can. S.C.R. 601, applied. Securities of other customers as well having been pledged to a bank for the whole indebtedness of the broker, which shares had been or might have been sold to satisfy the broker's debt, it was argued that those whose securities had been so resorted to had some right

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of subrogation or contribution or marshalling, as against the broker, which might be worked out in the bankruptcy proceeding; but, if such or any similar right could be asserted by others, it could not be affected by the judgment upon the issue now before the Court.
Re Bryant Isard & Co., Ex p. Fair (1922), 23 O.W.N. 113, 3 C.B.R. 480, and *Re Bryant Isard & Co., Ex p. Turner* (1925), 29 O.W.N. 167, 7 C.B.R. 44, distinguished.

AN interpleader issue.

December 19. The issue was tried by ORDE, J.A., without a jury, at a Toronto sittings.

Everett Bristol, K.C., for the plaintiff.

H. H. Davis, K.C., for the defendant company.

January 2. ORDE, J.A.:—This is an interpleader issue directed by an order of the Master in Chambers, upon the application of the Royal Bank of Canada, to determine whether Haggart, the plaintiff in the issue, is entitled, free of any claim or interest therein of the Trusts and Guarantee Company Ltd., the defendant in the issue, in its capacity as trustee in bankruptcy of the property of Orlando Heron, trading under the name of "Heron & Co.," to a certain stock certificate numbered Y3876 of the Hollinger Consolidated Gold Mines Ltd., for 340 shares of the capital stock of that company, and now in the possession of the Royal Bank, and to the said 340 shares.

When the matter first came before me, counsel stated that no *vivâ voce* evidence would be given and that they had agreed upon a statement of facts, which was put in. Upon examining this I thought that more information upon certain points might be material, and accordingly a supplemental statement was prepared, and upon these two statements of fact the issue was tried and argued.

On or about the 26th June, 1928, the plaintiff was a customer of Orlando Heron, then carrying on business in Toronto as a stockbroker under the name of Heron & Co., and had with Heron three marginal trading accounts upon which he was then indebted to Heron in the sum of \$18,700. On that date the plaintiff delivered to Heron a certificate of the Hollinger Consolidated Gold Mines Ltd., numbered Y3876, for 340 shares of its capital stock registered in his name, by way of additional security for his indebtedness to Heron. A form of transfer upon such certificate had been duly signed in blank by the plaintiff before such delivery.

Heron made an assignment in bankruptcy on the 27th February, 1929, but prior thereto had pledged the plaintiff's stock certificate for the 340 shares, together with a large number of bonds, shares,

and other securities, to the Royal Bank of Canada, to secure his indebtedness to the bank, which at the time of the bankruptcy amounted to \$489,258.08. The stock certificate was on that date still held by the bank as part of its security therefor.

At the date of the bankruptcy the plaintiff had paid Heron in full, and there was in fact a balance at his credit in Heron's books.

After the bankruptcy the bank realised, by the sale of certain of the securities in its hands, a sufficient sum to pay off Heron's indebtedness in full, and there were left in its hands securities to which it had not resorted of the approximate market value on the 15th May, 1929, of \$219,000.

Among the securities so remaining in its hands was the plaintiff's Hollinger stock certificate in question.

Heron's books shewed that at the date of the bankruptcy he should have held for customers 7,365 Hollinger shares, of which 6,200 shares had been purchased for customers upon marginal accounts and 1,165 shares had been deposited by customers as collateral security. There were in fact at that date on hand only 850 Hollinger shares, all of which had been pledged to, and were then in the possession of, the bank. The inference is, of course, that Heron had fraudulently sold not only the shares purchased for his customers (perhaps some of them had never been really purchased at all) but a large number of those specifically pledged by them to him as collateral.

Of the 850 Hollinger shares held by the bank 10 were sold, and the bank delivered to the trustee in bankruptcy 500 shares. The remaining 340 shares were those represented by the plaintiff's stock certificate. This certificate was not delivered to the trustee because of the plaintiff's demand that it should be delivered to him, and the bank in consequence interpleaded.

There were other customers of Heron's who claimed to be entitled to specific securities in the hands of the bank, but all such other customers consented that the securities so claimed should be delivered to the trustee, subject to whatever rights they might validly have therein.

The plaintiff from time to time, both before and after his pledge of the Hollinger shares, received from Heron bought and sold notes in connection with his transactions with Heron, upon which appeared the following memorandum:—

"When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way most convenient to us, and of selling without notice before or when margin exhausted."

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And he also from time to time received statements of his account with Heron upon which appeared the following memorandum:—

“In carrying stocks, bonds, or commodities for you on margin, we reserve the right to pledge same from time to time on such terms as lenders may require, either separately or together with other securities, to secure advances beyond the amount due to us on such securities, or to secure our general loans, and to buy or sell any or all of such securities by public or private sale without notice, when margins are running out, or when such sale or purchase is deemed necessary by us for our protection.”

The plaintiff at no time agreed to these memoranda or notations or to any such reservations or the exercise of any such rights by Heron. On the other hand, he did not at any time give Heron any notice of his dissent from such memoranda or notations or from such purported reservation of rights.

I think the foregoing sets forth substantially, though not quite so elaborately, all the material facts as stated by counsel.

The case presents no real difficulty. There can be no doubt that Heron's pledge of the plaintiff's 340 shares to the Royal Bank for any sum in excess of the amount owing by the plaintiff to him was wrongful and fraudulent. Whatever might be Heron's right to pledge shares carried for the plaintiff upon margin, for advances further than the plaintiff's indebtedness, by virtue of the notations upon the bought and sold notes and upon the statements of account, or by virtue of any custom or rule applicable to marginal transactions by brokers with their customers (there was no admission as to any such custom or rule), he could have no such right with respect to the Hollinger shares in question. Heron was not “carrying” those shares on margin for the plaintiff at all. They had been pledged for a specific purpose, and Heron clearly had no right as against the plaintiff to pledge them for any sum in excess of the plaintiff's indebtedness to him.

The bank, acting in good faith and without notice, doubtless acquired the right to hold the plaintiff's stock certificate, with its transfer signed in blank, as security for Heron's whole indebtedness. But, unless that fact in some way confers rights on others either as creditors of Heron or as owners of securities pledged to the bank under similar circumstances, it is quite clear that upon the discharge of the plaintiff's debt to Heron and of Heron's debt to the bank, the plaintiff became entitled as against Heron and the bank to the return of a security which had in fact never been resorted to for the payment of either debt and which had therefore been completely redeemed.

Mr. Davis did not suggest that the general body of Heron's creditors could have any right whatever to these shares as an asset of Heron's estate. Heron's property therein was merely that of a pledgee for a specific purpose. Once the plaintiff's debt to him was paid, Heron could have no property whatever in the shares, and the plaintiff therefore became entitled as against him, and therefore as against his creditors, to the redelivery of the security.

It is hardly necessary to cite authority for this. The principles governing the point are elementary. The fact that Heron was a stockbroker and that the plaintiff was trading with him on margin has really nothing to do with this particular transaction, which differs in no respect from a pledge given to secure a debt to any type of creditor. A broker has no right to pledge shares purchased for a customer for more than the amount due him, in the absence of some agreement with the customer, or some established custom binding upon the customer permitting it: *Conmee v. Securities Holding Co.* (1907), 38 Can. S.C.R. 601. *A fortiori* he can have no such right over shares not so purchased, but specifically pledged to him and for a definite purpose.

The plaintiff is not here in the position in which the claimants were in *Re Bryant Isard & Co., Ex p. Fair* (1922), 23 O.W.N. 113, 3 C.B.R. 840, and *Re Bryant Isard & Co., Ex p. Turner* (1925), 29 O.W.N. 167, 7 C.B.R. 44, where the claimants' shares had been realised upon and the proceeds formed part of a fund made up by the sale of the securities of several claimants. That fund was in the hands, or under the control, of the trustee in bankruptcy, and the rights of the claimants necessarily resolved themselves into a claim upon the fund.

Here the very instrument of title delivered to Heron to implement the pledge is still intact, unencumbered by any charge in favour either of Heron or of the bank. Heron has no property in it or in the shares it represents, and neither the certificate nor the shares can form any part of his bankrupt estate.

Mr. Davis really based his argument upon a different and somewhat novel principle. He suggested that, as the securities of other customers which Heron had also pledged to the bank for his whole indebtedness either have or may have been sold by the bank to satisfy Heron's debt, those whose securities had been so resorted to might have some right of subrogation or contribution or some right akin to that of marshallling, as against the plaintiff, and that it would be more appropriate and convenient that their respective rights should be worked out in the bankruptcy proceedings, as was done in the *Fair* and *Turner* cases above mentioned.

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Those two cases are however clearly distinguishable from this, because, as already stated, the fund in question there was in the possession or under the control of the trustee. I know of no authority to justify the trustee's setting up the *jus tertii* and claiming to rake into the bankruptcy property in which neither the bankrupt himself nor the general body of his creditors can have any possible interest, merely because other persons may possibly be entitled to assert some claim against the real owner of the security. There is no evidence that any such claim has been asserted. It is obvious, of course, that where a broker or any other person wrongfully pledges the respective securities of two persons for one debt, and the pledgee realises wholly from one security rather than the other, the one whose security is sold may feel aggrieved.

It was suggested that there might be some right of contribution, resembling that in maritime law which entitles one whose goods are jettisoned to save the ship and its cargo to contribution from those whose goods are saved. I know of no such principle outside of maritime law. But whether or not any such right or any other right as against the plaintiff can be asserted by any others I am not here called upon to determine. Those rights, if they exist, cannot be affected by this judgment. But there is nothing in the Bankruptcy Act or on principle to justify the claim by the trustee that the proceedings in bankruptcy are to constitute the arena for a contest over a piece of property in which neither the bankrupt nor the general body of his creditors can possibly have any estate or interest. There is no evidence that any such claim has been made, and the security is not even in the possession of the trustee. I can see no reason why it should be handed to the trustee merely because at one time Heron had it in his possession.

Mr. Davis in the course of his argument referred to the many difficulties which arise in stock brokerage bankruptcies and to an interesting article upon the subject in the Harvard Law Review, vol. 37, p. 860. That there are such difficulties is beyond question, but when they arise they must be solved by existing principles of law, even though in the result one individual may, by chance or the mere whim of a pledgee, be lucky enough to save something from the wreck, while another loses everything. Bankruptcy has always been attended by cases which, if put to the test of some principle of universal equity, appear to work injustice, as, for example, where one man exercises his right of stoppage *in transitu* in time, while another sees his whole consignment of goods go to swell the bankrupt's estate.

The plaintiff is entitled as against the defendant trustee to the delivery and possession of the stock certificate in question and to

the shares represented thereby, and there will be judgment accordingly. The plaintiff is also entitled to recover his costs of the trial and of the interpleader application and order from the defendant company, which, if it has protected itself in accordance with the Bankruptcy Act, will be entitled to indemnify itself as to such costs and as to its own out of the bankrupt estate.

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SCHOENFELD V. PILOT AUTOMOBILE AND ACCIDENT INSURANCE CO.
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Jan. 7.

Insurance (Automobile)—Judgment Recovered against Driver of Motor-vehicle for Injury to Person and Property—Execution Returned Unsatisfied—Action against Insurer for Amount of Judgment—Ontario Insurance Act, sec. 85—"Person Insured"—Driver of Vehicle Included by Terms of Policy—"Other Person"—Notification by Owner to Insurer—Adding Owner as Party to Action—Condition of Policy—Use of Car for Purposes other than Pleasure—"Principally"—Occasional Use for Commercial Purposes.

The purpose of sec. 85 (1) of the Ontario Insurance Act, R.S.O. 1927, ch. 222, is that damage to person or property resulting from the negligence of an impecunious operator of a motor-vehicle shall not go uncompensated when the very event which resulted in the loss has been insured against by an insurance company; and the subsection is not to be construed in any narrow or restricted sense.

A judgment was recovered by the plaintiffs (husband and wife) against C. for the negligent operation by C. of a motor-vehicle, whereby the plaintiffs' infant son was killed and property destroyed. The vehicle was driven by C., but was owned by his wife, who was not a party to the former action nor to this action. The vehicle was insured by the defendant company under a policy issued to C.'s wife, which was in force at the time of the accident, and by which the company agreed to indemnify the insured against loss on account of bodily injuries, including death, at any time resulting therefrom, accidentally suffered by any person, and on account of injuries to or destruction of property. In the policy this provision was immediately followed by the words: "Should the insured's . . . husband . . . if a duly licensed driver . . . operate the automobile with the permission . . . of the insured and as a result thereof injury be caused to the persons or property of others . . . the indemnity provided . . . shall be available to such driver . . . under the same conditions as . . . to the insured; provided that the indemnity payable thereunder shall be applied first to the protection of the insured, and the remainder, if any, to the protection of the other person entitled to indemnity under the terms of this section as the named insured shall in writing direct." C. was a duly licensed driver, and was operating the automobile with his wife's permission:—

1930. *Held*, in an action against the insurance company, brought under sec. 85 (1), that C. was "a person insured against liability for injury or damage to persons or property of others," within the meaning of that section, and the plaintiffs were entitled to recover from the insurance company the amount of the unsatisfied judgment obtained against C.

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LIMITED. *Williams v. Baltic Insurance Association of London Ltd.*, [1924] 2 K.B. 282, applied.

C.'s wife, not being a party to the action and not having notified the company in writing to pay the indemnity either to herself or C., and the plaintiffs having chosen to take judgment against C. only, can never be made liable for the plaintiff's injuries, and therefore can have no claim for indemnity against the company; but the company should not be called upon to pay anything in respect of C.'s liability unless and until his wife has so signified in writing or has been made a party to this action; and the final disposition of this action was deferred until one course or the other should be taken.

The policy provided that the insurer should not be liable if the automobile was being used for any purposes other than those specified in statement 7 of the application, which was, "that the automobile is and will principally be used for the following purposes—private and pleasure." There was no evidence that, except upon the one occasion when the accident occurred, the automobile was used for commercial purposes:—

Held, that this was not a breach of the condition—the words implying that occasionally, or at least once, it might be used for other purposes than pleasure.

ACTION to recover from the defendant company the amount of an unsatisfied judgment obtained by the plaintiffs against one George Cooper; the action being brought under sec. 85 of the Ontario Insurance Act, R.S.O. 1927, ch. 222.

The action was tried before GARROW, J., without a jury, at Kitchener.

C. R. Widdifield, for the plaintiffs.

F. J. Hughes, K.C., for the defendants.

January 7. GARROW, J.:—On the 12th February, 1929, the plaintiffs, who are husband and wife, recovered a judgment against one George Cooper for the sum of \$1,600 damages for the negligent operation of a motor-vehicle, whereby the plaintiffs' infant son was killed, as was also a horse owned by them. Execution upon the said judgment was duly issued for the judgment debt and for the taxed costs of the action, amounting to \$352.60, and a return has been made thereto of *nulla bona*, and the whole indebtedness remains unsatisfied.*

This action is now brought by the plaintiffs against the defendant insurance company under the provisions of sec. 85 of the Insurance Act, R.S.O. 1927, ch. 222, of which subsec. 1 reads as follows:—

“(1) In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for such injury or damage and an execution against the insured in respect thereof is returned unsatisfied, such execution creditor shall have a right of action against the insurer to recover an amount not exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied.”

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The motor-car which did the damage was on this occasion driven by Cooper, but it was the property of his wife, Edith Cooper, who was not made a party defendant to the first nor is she a party to the present action.

The car was insured with the defendant company under policy number 52-3010, issued in the name of Edith Cooper, and this policy was in full force and effect at the time of the accident.

Under the caption of “Automobile Insuring Agreements, Legal Liability for Bodily Injuries or Death and for Damage to Property of others,” the company agrees in the contract of insurance (1) to indemnify the insured against loss (a) on account of bodily injuries, including death, at any time resulting therefrom, accidentally suffered or alleged to have been suffered by any person, etc., and (b) on account of injuries to or destruction of property (excluding certain risks not here in question).

The foregoing provisions are followed immediately by these words, which I extract from the policy verbatim:—

“Should the insured’s wife, husband or adult child or minor child, if a duly licensed driver, drive or operate the automobile with the permission and consent of the insured and as a result thereof injury be caused to the persons or property of others, then in such event the indemnity provided by insuring agreement 1A and / or 1B shall be available to such driver having permission as aforesaid in the same manner and under the same conditions as it is available to the insured; provided that the indemnity payable thereunder shall be applied first to the protection of the insured, and the remainder, if any, to the protection of the other person entitled to indemnity under the terms of this section as the named insured shall in writing direct.”

It is admitted for the purpose of this action that Cooper, at the time of the accident, was a duly licensed driver of an automobile and that he was operating the car with his wife’s permission.

The main question to be determined is whether, in view of the paragraph of the policy quoted above, the husband is “a person insured against liability for injury or damage to persons or pro-

Garrow, J. 1930. perty of others," within the meaning of sec. 85 of the Insurance Act.

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If the words in the section "a person insured" mean only a person having an insurance policy issued directly to himself in respect of a motor-vehicle owned by himself and as to which he has paid the premium, then obviously that situation does not exist here. The person with whom the insurance contract was directly made and the person who paid the premium and who owned the car insured was and is Edith Cooper and not her husband.

But should the words be so restricted in their interpretation? I have, on consideration, come to the conclusion that they should not. The purpose of this comparatively recent legislation is that damage to person or property resulting from the negligence of an impecunious operator of a motor-vehicle shall not go uncompensated when the very event which resulted in the loss has been insured against by some insurance company, and I do not agree that the section is to be construed in any narrow or restricted sense.

Here the policy itself provides that, in the event which has happened, the indemnity . . . shall be available to the driver of the car in the same manner and under the same conditions as it is available to the insured. Having regard to that language, it seems to me to be clear that Cooper was and is "a person insured" within the meaning of the section. And the proviso in the policy to the effect that the indemnity payable shall be applied first to the protection of the insured, and the remainder, if any, to the protection of the other person entitled to indemnity, as the named insured shall in writing direct, evidently from its very language contemplates that the other person—in this case Cooper—is directly entitled to certain benefits under the policy.

The case of *Williams v. Baltic Insurance Association of London Ltd.*, [1924] 2 K.B. 282, is in many respects like the present. There one Williams took out a policy of insurance by which the insurers agreed to indemnify him against all sums for which the insured or any licensed personal friend or relative of the insured while driving the car with the assured's general knowledge and consent should become legally liable in compensation for accidental bodily injury caused to any person. Williams's sister, while driving the car with his consent, injured certain persons who brought an action against both Williams and his sister. The action was dismissed with costs against the former, but as to the latter judgment was recovered for a large amount with costs. Williams thereupon made a claim against the company to indemnify his sister against the established liability. The claim was referred to three arbitrators, who found in favour of the claimant, and the

matter then came before Roche, J., by way of a stated case. He held "without the slightest hesitation" that the plain meaning of the clause is that it covered the very thing that had happened, and that the contention made on behalf of the insurer to the effect that the clause in question must be limited to what the insured himself might be called upon to pay by reason of his sister's having driven the car, was not entitled to prevail. Later in the judgment this language is used: "The general argument that Mr. Bransby Williams cannot recover for Miss Bransby Williams because the latter cannot recover for herself, is based upon this, that the insured is Mr. Bransby Williams. That, I think, is begging the question. Mr. Bransby Williams is the insured in the sense that he is the person who effected the insurance, but it is an insurance for himself and the other persons mentioned in cl. 2, and, accordingly, the company's contract is to indemnify all such persons in the event of those things happening against which the insurance is effected."

I would hold, therefore, that George Cooper, the judgment debtor, is a person insured within the meaning of sec. 85.

Then to what extent do the words in the section "in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied" affect the situation? Probably, as in the *Williams* case, any action on Cooper's behalf to enforce his claim to be indemnified would have to be brought in his wife's name as trustee for him. She is, as already stated, not a party to this action, nor has she, as the named assured, so far as appears before me, ever notified the company in writing to apply the indemnity payable either to herself or her husband. She cannot now, since the plaintiffs have chosen to take judgment against her husband only, ever be made liable for the injuries done, and therefore she herself can have no claim to indemnity from the defendant company. Why she refuses or neglects to require the defendant to carry out its contract, in respect of which she has herself paid the premium, I do not know. The Court, however, cannot interfere with or cut down the contractual rights of the defendant, and it is probably correct for it to say that it should not be called upon to pay anything in respect of the husband's liability unless and until the wife has so signified in writing, or at least unless she is made a party to this action. But the fact that the wife has not, so far, signified her wishes in regard to the indemnity payable need not prevent her doing so now; nor was her doing so, in my opinion, a condition precedent to the bringing of the present action. If, therefore, the wife, on or before the 25th day of January, 1930, signifies in writing to the defendant company that

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Garrow, J. she requires the indemnity payable under the contract of insurance
 1930. to be applied to the protection of her husband, as being the "other
 Schoenfeld person" entitled to indemnity under the clause referred to, there
 v. will be judgment in favour of the plaintiffs for the amount claimed
 Pilot (being within the amount of the policy), with costs of the action.
 Automobile If the wife fails so to direct within the time limited, then
 and even at this late stage she should be added as a party defendant,
 Accident and in that event I would not finally dispose of the action until
 Insurance Co. that has been done. If the wife does so notify the defendant as
 Limited. indicated, proof of that fact may be furnished by affidavit to be
 filed with the Local Registrar at Kitchener.

I should, before leaving the case, deal with another point that was raised, namely, that the company could not be liable in any event because the motor-car, at the time the injuries were suffered, was being used for business purposes, and the policy provides that the insurer shall not be liable if the automobile is being used for any purposes other than those specified in statement 7 of the application. But, turning to statement 7, I find that "the automobile is and will principally be used for the following purposes—private and pleasure." There was no evidence that, except upon the one occasion when the accident occurred, the automobile was used for commercial purposes. This would not, in my opinion, constitute a breach of the condition that it was to be used principally for pleasure. The words imply that occasionally, or at least once, it may be used for other purposes and still be covered by the contract of insurance.

[APPELLATE DIVISION.]

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RE FORBES AND CITY OF TORONTO.

Jan. 10.

Municipal Corporations—Expropriation of Land—Compensation—Arbitration and Award—Water-lot—Ascertainment of Value at Time of Passing of Expropriating By-law—Value to the Owner—Present and Future Advantages—Present Value of—Potentialities—Interest—Jurisdiction of Arbitrator—By-law Restricting Use of Property—Possibility of Rescission—Allowance for Compulsory Taking—Special Use of Property—Earnings from.

Upon appeal and cross-appeal from an award fixing the compensation to be paid to a landowner for certain lands and a water-lot expropriated by a city corporation for park purposes:—
Held, that the value of the water-lot was to be ascertained as of the date of the expropriating by-law, the 20th February, 1911, and not as of the date of the arbitration held in 1929.

In re Prittie and Toronto (1892), 19 A.R. 503, followed.

Semble, a different situation might be created if the corporation should exercise its right to refuse to take the property at the price fixed by the award: see *Grimshaw v. City of Toronto* (1913), 28 O.L.R. 512, 516.

The value to be paid for is the value to the owner at the date of the taking, not the value to the taker; and the value to the owner consists in all advantages, present and future, which the land possesses, but it is the present value alone of such advantages that falls to be determined.

Cedar Rapids Manufacturing and Power Co. v. Lacoste, [1914] A.C. 569, followed.

In the present case the compensation should be ascertained by taking the value of the water-lot as it stood in 1911, together with the then present worth of probable or even possible future developments; and the amount of the award in respect of the water-lot should be increased.

An arbitrator has no jurisdiction to allow interest upon the amount of the compensation; and the Court upon appeal can deal with such matters only as are within the arbitrator's jurisdiction.

It was the duty of the arbitrator, in fixing compensation for the property other than the water-lot, to take into consideration the probability or even the possibility of the rescission of any by-law restricting the use to which the property might be put.

Re Gibson and City of Toronto (1913), 28 O.L.R. 20, and *Campbell v. Irwin* (1914), 32 O.L.R. 48, followed.

An allowance for compulsory taking may properly be made by the arbitrator; the amount of the allowance is in his discretion; but, *semble*, it should not exceed 10 per cent.

Re Torrance and Province of Ontario (1922), 52 O.L.R. 325, and *Re Lennox and Toronto Board of Education* (1926), 58 O.L.R. 427, followed.

The arbitrator did not err in considering certain earnings of the land-owner in respect of a special use of a portion of the property for parking cars.

Re Meyer and City of Toronto (1914), 30 O.L.R. 426, explained and followed.

The aggregate amount of the compensation allowed by the arbitrator was reasonable, and, save in respect of the water-lot, should not be altered upon appeal.

APPEAL by the Corporation of the City of Toronto, contestant, and cross-appeal by Forbes, claimant, from an award of the Official Arbitrator fixing the compensation for lands expropriated by the corporation for park purposes.

November 28 and 29, 1929. The appeal and cross-appeal were heard by MULLOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJA.

F. A. A. Campbell, for the corporation. The proper basis of compensation is the fair market value of the land plus any special use to which it can or may be put. No special user was shewn here. The arbitrator erred in this respect and in awarding damages on the evidence of one witness who had little practical experience in actual land values. The arbitrator also erred in not taking

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into account the fact that the land was subject to restrictions the removal of which was most improbable. The arbitrator erred in allowing an additional value of \$1,500 for the house, in that the value of the house would be absorbed in the commercial value of the land if fully realised. With regard to the water-lot the arbitrator erred in allowing a substantial amount inferentially for taxes paid since 1911. The arbitrator also erred in allowing 10 per cent. for compulsory taking in addition to the actual valuation and not as part thereof. There is no legal authority for such allowance. Here every single item has been taken into account. The claimant is entitled to nothing more.

J. W. Carrick, for the claimant. The residential restriction is obsolete, and, being the corporation's own restriction, it cannot be set up as something to be considered by the arbitrator in making an award based on the possible commercial value. With regard to the water-lot the compensation is properly based on the value at the date of the arbitration in 1929, and not at the date of the expropriation by-law in 1911, because nothing further was done under that by-law, and because taxes were imposed and collected by the corporation until 1929. The corporation is now estopped from contending that the date of the award should be 1911. Reference to *Re Byerly and City of Winnipeg* (1911), 29 Man. R. 438. The claimant should have been allowed the full 10 per cent. for compulsory taking, in accordance with the established practice in matters of this kind.

January 10, 1930. The judgment of the Court was read by GRANT, J.A.:—This is an appeal by the city corporation and a cross-appeal by the respondent from the award, dated the 13th June, 1929, of the Official Arbitrator, in respect of an arbitration conducted before him for the purpose of fixing the compensation to be allowed to the respondent in respect of residence property situated at the south-east corner of the Lakeshore Boulevard and Dunn Avenue, in the city of Toronto, together with the water-lot adjoining the same. The property above mentioned was expropriated by the city corporation under three several by-laws, namely: the water-lot under by-law No. 5658, passed on the 20th February, 1911; and the remainder of the property by two by-laws, being respectively No. 11768, passed on the 26th June, 1928, and No. 12170, passed on the 22nd April, 1929.

The residence property consists of lot No. 1 on the east side of Dunn Avenue, plan No. 935, having a frontage on the Lakeshore Boulevard of 61 feet by a depth along the easterly side of Dunn Avenue of 182 feet. The water-lot, which lies immediately to the

south of lot No. 1, has a width of 61 feet by a depth of 660 feet. App. Div.

There is involved also with lot No. 1 a small strip of land 1930.
which has a width of 8 or 10 feet at the shore-line, and runs north-
erly in a triangular form but finishes in an acute angle before it RE FORBES
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reaches the Lakeshore Boulevard.

All of the above properties are involved in the arbitration Grant, J.A.
which follows their expropriation by the city corporation.

The appeal by the city corporation, although by the notice of appeal it was suggested that the arbitrator had erred in principle, resolved itself substantially upon the argument into an attack upon the arbitrator's findings as to the value of the respective pieces of property. The main attack was upon the amount allowed by the arbitrator in respect of the expropriation of the water-lot.

The cross-appeal by the claimant was similarly an attack upon the amount allowed by the arbitrator, and in respect of the water-lot the claimant's counsel contended that its value should be ascertained as of the present time and not as of the year 1911 when the by-law by which the expropriation was made was passed and pursuant to which the arbitration was rendered necessary.

The arbitrator was of opinion that the value of the water-lot was to be ascertained as of February, 1911, and in this conclusion, in my opinion, he was right. The only authority cited by the claimant's counsel for his contention in that regard was a decision of an appellate court in Manitoba, *Re Byerly and City of Winnipeg*, 20 Man. R. 438. To the contrary is the decision of the former Court of Appeal of Ontario, which is to be found in *In re Prittie and Toronto* (1892), 19 A.R. 503, which decision was referred to in the judgment of the Manitoba Court, which preferred to follow the dissenting opinion of Osler, J.A., rather than the opinion of the majority of the Court.

The decision of the Ontario Court of Appeal is binding upon us, and has been recognised subsequently as settling the question.

A different situation might be created in case the city corporation should exercise its right to refuse to take the property at the price fixed by the arbitrator, for which special provision is now made by the statute. *Vide Grimshaw v. City of Toronto* (1913), 28 O.L.R. 512, at p. 516, where the cases are distinguished.

Dealing with the question of compensation for the water-lot as fixed by the arbitrator, the law appears to be well settled that, as expressed by Lord Dunedin, of the Judicial Committee, in *Cedar Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A. C. 569, at p. 576, (1) the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker; (2) the value to the owner consists in all advantages which

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1930. *alone of such advantages* that falls to be determined.

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Grant, J.A. This has frequently been expressed as providing for the taking
of the present value or worth of the potentialities of the property,
As I understand the principle, it is that the arbitrator shall, to the
best of his ability, ascertain and take into his consideration the
potentialities, and shall then determine the then present worth
of the property, keeping in mind, as a factor in such determination,
the prospects for the future.

Upon this principle, the compensation to be allowed for the
water-lot, which was expropriated by by-law in 1911, should be
neither the bare value of the water-lot as it then existed, without
more, nor, on the other hand, should it be, as apparently was con-
tended by the claimant, the value which has since accrued to the
water-lot by the great development which has subsequently taken
place by reason of the harbour and other improvements. Such
compensation should be ascertained by taking the value of the
water-lot as it stood in 1911, together with also the then present
worth of its potentialities; that is to say, the then present worth
of probable or even possible future development. It has happened
in the present case, simply because neither of the parties has taken
statutory steps to bring on an earlier arbitration, that the proceed-
ings to fix the compensation were not taken until after the lapse
of 16 or 17 years, and, in consequence, great developments have
taken place, whereby the value of the water-lot, at the time of the
arbitration, was probably greatly enhanced. These developments
may afford some evidence of the potentialities of the water-lot, and
of the property generally, as the latter existed in 1911; but it was
their then present worth or value which the arbitrator was required
to ascertain as best he could, and not the very greatly increased
value as shewn by and resulting from the later developments, nor
can he value them as a part of the whole scheme which the city
corporation may have in hand, and for which the expropriation
was being made.

In this view of the governing principle, I am quite definitely
of opinion that the arbitrator did not err on the side of liberality
in the compensation which he allowed in respect of the water-lot.
In my opinion, the sum of \$3,050 allowed by the arbitrator might
quite reasonably be increased to the sum of \$5,000, having in mind
particularly the potentialities in respect of the water-lot, and I
would increase the amount of the compensation to be allowed to the
claimant upon that item to the sum above stated.

The claimant, in the memorandum submitted by counsel, urges
that she should be allowed interest upon the amount of the com-

pensation. It is well-settled law that the arbitrator has no jurisdiction to allow interest. His authority is limited to the fixing of the compensation, and this Court, upon appeal from the arbitrator, must deal with such matters only as are within the arbitrator's jurisdiction. If the right to interest exists (upon which I do not express any opinion in the facts of this case), the steps for its recovery must be taken elsewhere.

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Counsel for the city corporation contended that the arbitrator, in fixing compensation for the property other than the water-lot, was in error in taking under consideration the possibility or probability that the city by-law by which the district was restricted to residential purposes would or might be repealed, and the property thereby rendered available for business purposes. The authorities are quite clear to the effect that the arbitrator should take into consideration the probability or even the possibility of the rescission of any by-law restricting the use to which the property might be put. It is his duty so to do. This is quite clearly stated by the Court of Appeal in *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, the principle of which was approved and followed in *Campbell v. Irwin* (1914), 32 O.L.R. 48. See particularly at the foot of p. 64, in the opinion of Hodgins, J.A.

In this connection it should be noted that the only restrictions appearing on the record are against the erection of "apartments or tenement houses or garages to be used for hire or gain." Manifestly this is not a general restriction against the use of the property for business purposes, and the arbitrator was quite right in considering such use in arriving at the compensation to be allowed.

It was further contended on behalf of the city corporation that the arbitrator should not have allowed the sum of \$3,000 for compulsory taking. It was made quite clear by the Appellate Division in *Re Torrance and Province of Ontario* (1922), 52 O.L.R. 325, that an allowance for compulsory taking might properly be made by the arbitrator, but the opinion was expressed by some members of the Court that 10 per cent. should be the maximum of such allowance. It was not suggested by any member of the Court that 10 per cent. was fixed as the amount always to be allowed, but, on the other hand, the arbitrator should exercise his discretion as to the rate upon which the allowance should be based, probably not exceeding 10 per cent.

To the same effect is the decision of the Second Divisional Court in *Re Lennox and Toronto Board of Education* (1926), 58 O.L.R. 427.

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In the present case the arbitrator has allowed the sum of \$3,000, which allowance, under the circumstances of this case, I should not be prepared to disturb.

Objection was made by counsel for the city corporation to the consideration by the arbitrator of certain earnings which accrued to the claimant by reason of a special use of a portion of the property in recent years, namely, allowing cars to be parked thereon during the Canadian National Exposition. This property apparently has a special value by reason of its proximity to the exhibition property, which lies almost immediately to the east thereof. As supporting this objection, counsel for the city corporation cited the case of *Re Meyer and City of Toronto* (1914), 30 O.L.R. 426. A perusal of the judgment in that case makes it quite clear that what is there decided is that it is not proper to capitalise the profits of a business and to take the result as the value of the property, for the simple reason that there are other factors, such as the personal exertions and talents of the proprietors, etc., which enter into the making of the profits. It is, however, made equally clear by the reasons for judgment in that case that the "profits which are being earned form an element to be considered in deciding as to the value of the land and as demonstrating the uses to which it may reasonably and advantageously be put and as giving it unique or special value." (*Vide* head-note).

Upon a careful consideration of the whole matter, having in mind the character and the location of the property, its proximity to the Exhibition Park, and its water-front, together with the uses to which it might be put and of which it is reasonably capable, I am of opinion that the compensation allowed by the arbitrator is such an amount in the aggregate as might reasonably be allowed to the claimant, and, save in respect of the water-lot, should not be altered upon appeal.

It appeared in the evidence that the city corporation has been collecting taxes upon the water-lot from the claimant during the years which have elapsed since the expropriation by-law was passed in 1911, the amount so collected being stated by one of the claimant's witnesses to be the sum of \$607.43. While probably neither the arbitrator nor this Court has power, as part of the arbitration proceeding or the appeal therein, to order the repayment of these taxes, upon the suggestion of the Court, counsel for the city corporation has given a written undertaking for the repayment of the taxes so paid since the date of the expropriation in 1911. As the water-lot, by reason of the passing of the expropriation by-law, has been made a sterile asset during all these years, this refund of taxes paid should carry simple interest.

The appeal by the city corporation should be dismissed with costs, and the cross-appeal of the claimant, which has succeeded in respect of the allowance for the taking of the water-lot, should be allowed also with costs.

Appeal dismissed and cross-appeal allowed.

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[IN CHAMBERS.]

RE BANK OF MONTREAL V. STRACHAN.

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Division Courts—Jurisdiction—Claim upon Unaccepted Bills of Exchange—Division Courts Act, R.S.O. 1927, ch. 95, sec. 54—Ascertainment of Amount Claimed by Signature of Drawer—Necessity for Extrinsic Evidence—Proof of Fact of Presentment and Notice of Dishonour—Bills of Exchange Act, R.S.C. 1927, ch. 16, secs. 96, 130, 166—Acquiescence.

The jurisdiction of a Division Court is limited by statute, and, if the conditions precedent to its exercise do not exist, the whole proceeding in the court is *coram non judice*. As a general rule, every circumstance required by the statute to give jurisdiction to an inferior court must appear on the face of the proceedings or by reasonable intendment.

Serjeant v. Dale (1877), 2 Q.B.D. 558, and *Rex v. Inhabitants of All Saints Southampton* (1828), 7 B. & C. 785, followed.

Acquiescence does not confer jurisdiction.

In an action brought in a Division Court to recover \$309.15 and interest upon certain unaccepted bills of exchange, the jurisdiction depended upon whether the amount was ascertained by the signature of the defendant in the manner provided by sec. 54 of the Division Courts Act; and it was *held*, that it was not so ascertained, it being necessary for the plaintiff to give other and extrinsic evidence beyond the production of the bills and proof of the signature of the defendant, the drawer.

Presentment and notice of dishonour were not to be presumed, but must be shewn by evidence *dehors* the documents.

Provisions of the Bills of Exchange Act considered.

MOTION by the defendant for prohibition to a Division Court.

The motion was heard by KELLY, J., in Chambers.

J. R. Roaf, K.C., for the defendant.

R. H. Sankey, for the plaintiffs.

January 13. KELLY, J.:—The claim sued upon is for \$309.15 and interest, based upon five drafts drawn by the defendant in favour of the plaintiffs, all, so far as they shew, unaccepted by their respective drawees, and a cheque upon the Imperial Bank of Canada, purporting to be endorsed in blank by the payee thereof. Protest for their non-acceptance or non-payment does not,

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nor does notice of dishonour, form any part of the material. The drafts matured at dates extending from the 8th December, 1926, to the 3rd February, 1927. The action was not begun until the 22nd February, 1929.

The jurisdiction conferred upon a Division Court in claims of this nature is thus defined in the Division Courts Act, R.S.O. 1927, ch. 95, sec. 54: "Save as otherwise provided by this Act the Court shall have jurisdiction in, . . . (d) an action for the recovery of a debt or money demand, where the amount claimed, exclusive of interest, . . . does not exceed \$400, and the amount claimed is,—(i) ascertained by the signature of the defendant or of the person whom as executor or administrator he represents; or (ii) the balance of an amount not exceeding \$400 which amount is so ascertained . . . ; but an amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it," etc.

The application can be disposed of on the first ground of objection by reference to this provision and the provisions of the Bills of Exchange Act, R.S.C. 1927, ch. 16. By sec. 130 of the latter Act, the drawer of a bill, by drawing it, engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any endorser who is compelled to pay it, if *the requisite proceedings on dishonour are duly taken*.

By sec. 96, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged: Provided that (a) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission; and (b) where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment, unless the bill shall in the meantime have been accepted.

A cheque being a bill of exchange drawn on a bank payable on demand, the provisions applicable to a bill of exchange payable on demand apply to it; and, by sec. 166, the drawer is entitled to damages as therein provided for non-presentment for payment within a reasonable time. The drawer, being really in the position of a guarantor that the drawee will accept and pay according to the tenor of the bill and that he will compensate the holder if it is dishonoured, is entitled to notice of the dishonour.

Assuming, therefore, the production of the documents now sued upon and proof of the defendant's signature thereto, it is still necessary for the plaintiff to give further evidence. Presentment and notice of dishonour are not to be presumed; and, even if it should turn out to be the fact that such presentment and notice were made and given, that fact must be established by other evidence than the production of the documents and proof of the defendant's signature thereto.

Jurisdiction in a case such as this is confined and limited by statute; and, if the conditions precedent to its exercise do not exist, the whole proceeding is *coram non judice*—*Serjeant v. Dale* (1877), 2 Q.B.D. 558, at p. 566. As a general rule, every circumstance required by the statute to give jurisdiction to an inferior court must, in its proceedings, appear on the face of the proceedings or by reasonable intendment. See *Rex v. Inhabitants of All Saints Southampton* (1828), 7 B. & C. 785.

It is unnecessary to discuss the other objections raised by the notice of motion. The argument of counsel was that the defendant, by his conduct at the time the matter was before the County Court Judge, acquiesced. That is not so; but, even if it had been so, acquiescence does not confer jurisdiction.

The application should be, and is, granted and the action dismissed, both with costs, but without prejudice to the plaintiffs' right to proceed in the proper forum.

[APPELLATE DIVISION.]

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Bankruptcy — Undischarged Bankrupt Engaging in Business and Acquiring Assets—Order Directing Discharged Trustee to Take Possession of and Administer such Assets—Jurisdiction—Status of Former Trustee as Applicant—Provisions of Bankruptcy Act, R.S.C. 1927, ch. 11.

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A person who had been declared bankrupt, and whose insolvent estate had been fully administered, but who had not obtained his discharge, went into business and acquired certain assets. Upon this being discovered by the person who had administered the estate as authorised trustee under the Bankruptcy Act, and had been discharged, he made an application to the Registrar in Bankruptcy for directions, and the Registrar thereupon made an order directing the applicant to take possession of and administer these after-acquired assets:—

Held (ORDE, J.A., dissenting), that there was no power in the Court, under sec. 37 (2) of the Act or otherwise, to appoint or continue the applicant as trustee, and he had no status to make the application.

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Sections 23 (a), 37 (2), 67, and 79 of the Act considered.

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HERMAN. *Per ORDE, J.A.*:—Remarks upon the effect of sec. 39 of the English Bankruptcy Act, 4 & 5 Geo. V. ch. 59, the provisions of that section not having been embodied in the Canadian Act.

AN appeal by the trustee in bankruptcy of the estate of Samuel Herman and Celia Herman from an order of ROSE, J., reversing an order of the Registrar in Bankruptcy.

The following statement of facts is taken from the judgment of FISHER, J.A.:—

The debtors carried on business at Sarnia, and made an authorised assignment on the 12th May, 1927. Subsequently the creditors appointed George A. Stephenson their trustee to administer the estate, and it is admitted that the trustee did fully administer the estate and obtained on the 17th July, 1928, with the approval of the inspectors and creditors, his discharge under sec. 86 of the Act. Thereafter Samuel Herman, one of the insolvent debtors, without obtaining his discharge and without the knowledge of the trustee and the creditors, again entered into business, at Port Colborne, and from that business acquired certain property which is the subject of this litigation. The trustee, upon discovery of the newly-acquired property, made a motion for directions, and obtained from the Registrar the following order:—

“That the said George A. Stephenson, the authorised trustee of the said estate, upon giving security to the satisfaction of the Court in the sum of \$2,000, be and he is hereby directed to take possession of and administer all such after-acquired assets and any other discoverable assets of the said estate, with all rights, powers, and duties which, with relation to such estate generally, he originally had upon his original appointment as authorised trustee thereof.”

Subsequently, on the 26th October, 1928, under sec. 42, an order was obtained authorising the trustee to sell the assets and to notify all the creditors of the insolvent debtor and of Samuel Herman and to call a meeting of the creditors. The trustee took possession of the property, and at the meeting of creditors, so-called, it was agreed that he should sell the assets, which he has done, and hold the proceeds, which amount to about \$3,000, until after the final determination of these proceedings.

An appeal was taken on behalf of certain of the new creditors, who had been notified pursuant to the Registrar's order, before Mr. Justice Rose, to set aside the order appointing or continuing the trustee to administer the assets so found. Mr. Justice Rose

held that, the trustee having been discharged, there was no power under sec. 37 (2) to reappoint or continue him and he had no status to make the application.

Section 37(2) provides that "a trustee may be removed and another trustee appointed or substituted by creditors by ordinary resolution at any meeting of creditors or for cause by the Court;" and, by sec. 42, "an authorised trustee" may apply for directions.

May 15 and 16, 1929. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, JJ.A.

W. F. O'Connor, K.C., for the appellant, argued that the Bankruptcy Act puts the assigned property "under the authority of the Court." The trustee was discharged only from "further performance of duties" and not from his trusts. The title to property vested in the trustee by the Act could not be divested by a mere release from further performance of duties. Alternatively, the trustee was reappointed by the original creditors. Also, he was reappointed by the Registrar, whose order so appointing has not been appealed from. That order is not subject to collateral attack. The trustee was such *de facto*, at least, when he applied for directions. If sec. 37 of the Bankruptcy Act requires the removal of an existing trustee in order to justify the appointment of a new trustee, there was a removal; for, assuming the trusteeship of the trust property to have been vacated by the release of the trustee, the debtor became constructive trustee of that property for his creditors, and Stephenson's appointment superseded him. The Bankruptcy Court has the like right to appoint trustees as the Supreme Court of Ontario: Bankruptcy Act, sec. 152. The "new" creditors have no status as such nor any right to participate in the avails of the after-acquired property. Only creditors who could and did prove their claims in the bankruptcy proceedings may participate. The Dominion Parliament has not enacted the provisions of the English Bankruptcy Act of 1914 which enable distribution among different classes of creditors upon successive bankruptcies. Reference to *Cohen v. Mitchell* (1890), 25 Q.B.D. 262; *Ex p. Bourne, In re Bourne* (1826), 2 Gl. & J. 137; *Ex p. Ford, In re Caughey* (1876), 1 Ch. D. 521; *In re Clark, Ex p. Beardmore*, [1894] 2 Q. B. 393; *Bird v. Philpott*, [1900] 1 Ch. 822; *In re Anderson*, [1911] 1 K.B. 896; *In re Phillips*, [1914] 2 K.B. 689; Halsbury's Laws of England, vol. 2, p. 165, note (c), and p. 166, note (i); Halsbury's Laws of England Supplement (1928), p. 182.

Lewis Duncan and S. J. Birnbaum, for persons who became creditors of Samuel Herman after the making of the receiving

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order, respondents, contended that the property of the debtor, divisible amongst his creditors, is of two kinds, i.e., property belonging to the debtor at the date of his bankruptcy and property acquired after that date. The after-acquired property does not vest in the trustee until he intervenes and claims it: *Cohen v. Mitchell, supra*, and sec. 67 of the Bankruptcy Act. There has been no intervention here. The trustee was discharged by the Court on "full administration:" sec. 86. After the trustee's discharge the debtor started business in another locality under another name, and acquired goods on credit. The discharged trustee purported to intervene and claim the goods. The intervention section (67) does not apply to such goods or to a discharged trustee. *In re Clark, Ex p. Beardmore, supra*, is not applicable, for there, though the trustee had been discharged, the Official Receiver stood in his place. There is no power to reappoint a discharged trustee: sec. 37. The judgment of Rose, J., is right. See *In re John Swartz* (1928), 10 C.B.R. 231. A discharged trustee cannot apply under sec. 42 for directions. The discharged trustee is seeking the aid of the Court and must do equity. It would be inequitable to allow the old creditors to take the goods of the new creditors without payment. When the old creditors consented to the discharge of the trustee, they impliedly consented to the debtor trading with new creditors. They are estopped from claiming all the assets to the exclusion of the new creditors: *Troughton v. Gitley* (1766), 27 E.R. 408; *Tucker v. Hernaman* (1853), 4 DeG. M. & G. 395. The debtor has been adjudicated bankrupt a second time on the petition of new creditors. The proper course is to allow the assets to be distributed under that bankruptcy between the new creditors and such of the old creditors (proving in respect of their unpaid balances) as are not estopped.

January 17, 1930. FISHER, J.A. (after stating the facts as above):—Two points of first importance arise on this appeal (a) the right of a discharged trustee to intervene and claim after-acquired property; and (b) the respective rights of creditors in after-acquired property.

Counsel for the trustee contends that under sec. 37(2) there is power to appoint a new trustee, and in any event the Act contemplates a trustee continuing to be a trustee notwithstanding his discharge and that he had authority as such to apply for directions.

In my opinion Mr. Justice Rose was right in holding that sec. 37(2) had no application to the present case. That section

means that creditors may, by resolution at any time, and for reasons that may appear to them proper, remove a trustee, and if the removal is not made at the instance of creditors by resolution, then it may be effected on an application to the Court *for cause*, such as, I take it, that a trustee has been guilty of misconduct or fraud or dishonesty or has become bankrupt or otherwise incapable of acting as a trustee.

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In this case there was no resolution by creditors and no application to the Court for cause. I think it would have been quite different if, after the order of discharge had been made, it was discovered that property which had actually vested in the trustee had not been administered, and, that property being part of the insolvent's estate, there had therefore not been a full administration. In these circumstances there would be nothing to prevent the trustee on a motion for directions asking the Court to rescind the order of discharge on the ground of mistake, and authorising him to take possession of the after-acquired property. But the rights and remedies of old creditors as to after-acquired property are confined to those found in the Bankruptcy Act.

In *In re Pettitt's Estate* (1876), 1 Ch. D. 478, Bacon, V.-C., decided that if, after the close of a bankruptcy, the debtor has not obtained an order of discharge, the creditors have certain remedies which are defined in the Act—but the right to take a debtor's property acquired since the close of the bankruptcy is not one of those remedies, as after the close of a bankruptcy the bankruptcy exists for certain purposes only, and “amongst those purposes is not that of vesting the debtor's after-acquired property in the trustee.”

See also *In re Smith, Green v. Smith* (1883), 24 Ch. D. 672.

So far as I have been able to find, the only remedies given to old creditors by the Bankruptcy Act are to be found in sec. 79. That section provides for declaration of supplementary dividends after final dividend, if, as, and when the trustee gets sufficient property to declare one. Here there was no trustee to get in the after-acquired property for the benefit of the first bankruptcy creditors. Therefore those creditors have no rights under the Act, and under *In re Pettitt, supra*, no rights at all.

The definition given to after-acquired property in sec. 23(a), when read in connection with sec. 67, which validates transactions in respect to after-acquired property, must, I think, be limited so as to include only such after-acquired property *as comes into the hands of the trustee during his tenure of office*.

I agree with the contention of learned counsel for the respondents that, as the receiving order vested all property in the trustee, and the trustee having been discharged with the approval of the

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1930. whom the after-acquired property can vest, and that the trustee
RE for the old creditors is estopped from urging his reappointment,
HERMAN. or the appointment of a new trustee. See *Morgan v. Knight*
Fisher, J.A. (1864), 33 L.J.C.P. 168. In that case it was held that the first
bankruptcy trustee had no status to claim the property against the
second bankruptcy trustee. See also *In re Bourne*, 2 Gl. & J. 137,
and *Butler v. Hobson* (1838), 4 Bing. N.C. 290.

In re Clark, Ex p. Beardmore, [1894] 2 Q.B. 393, relied on by
learned counsel for the appellant, where it was held that property
acquired by an undischarged bankrupt in a business carried on
by him after his bankruptcy, without the knowledge of the trustee,
will in the event of a second bankruptcy vest in the trustee under
the second bankruptcy, is of no assistance to the appellant, be-
cause in that case, although the trustee had been discharged, under
the English Act an official receiver, upon the trustee's discharge,
steps in and is entitled to any unadministered property.

We are not called upon on this appeal to decide whether the
old and new creditors participate equally, or whether the new
creditors only are entitled, but if I had to decide that question I
should be tempted to apply equity in its popular sense as decided
in *In re Thellusson*, [1919] 2 K.B. 735, and *Ex p. James, In re*
Condon (1874), L.R. 2 Ch. 609, because it appears to me a mon-
strous proposition that creditors who had nothing whatever to do
with creating these assets should come in and ask the Court to
give, as urged by the appellant's counsel, the property to them in
exclusion of the new creditors.

The result of my conclusions is, that the trustee had no status
to apply for, nor the Registrar jurisdiction to make, the order,
and the appeal from the reversing order of Rose, J., will be dis-
missed with costs payable by the appellant.

LATCHFORD, C.J.:—I agree in the result.

MASTEN, J.A.:—This Court is limited to a very narrow ques-
tion in determining the present appeal, viz.: Was Rose, J., right
in determining that the Registrar erred in presuming to give direc-
tions to the appellant for dealing with and disposing of certain
assets which had been acquired by an undischarged bankrupt after
the original estate had been fully distributed and the trustee dis-
charged?

On the motion before Rose, J., the status of the trustee was
questioned; and, as I understand his reasons, Rose, J., held that
he had no status because his re-appointment as trustee in the

original bankruptcy was nugatory, no jurisdiction having been created by the Bankruptcy Act to make such re-appointment.

As I understand the facts, all the assets of the bankrupt which were in existence up to the date of the trustee's discharge were got in by the trustee and duly administered; the assets now in question were acquired by the bankrupt after the discharge of the trustee and before the bankrupt had received a discharge.

I can find no provision in the Act authorising the making of the order of reappointment of the discharged trustee for the purpose of dealing with these after-acquired assets. If this is the true view, then that order was made without authority and is void. In my opinion, the Judge below was bound to take notice of the want of status of the applicant when it was drawn to his attention, notwithstanding the fact that the order reappointing the trustee had not been appealed against. In this view of the case, the broader question as to the parties entitled to share in the after-acquired property does not arise.

The appeal should be dismissed with costs payable by the appellant.

ORDE, J.A.:—Owing largely, I think, to the failure of the Bankruptcy Act to provide for the somewhat unusual situation which has arisen here, I find it extremely difficult to arrive at a conclusion that is satisfactory to myself.

In England, prior to 1914, when property was acquired by an undischarged bankrupt after his bankruptcy, many difficulties had arisen as to the rights, if any, of others than those creditors who had proved in the bankruptcy proceedings, and the right of the trustee to take possession of the after-acquired property which by statute became vested in him was to some extent modified. Protection for the bankrupt and his family as to personal earnings was afforded, and a doctrine by way of estoppel had developed so as to exclude the trustee or the creditors when they had stood by and allowed the bankrupt to resume business and incur liabilities. And the trustee's right might be lost if he did not intervene and take possession before others had in good faith and for value acquired some interest in the property itself, that is, by way of sale or charge as distinct from a mere claim as a creditor. This last modification is embodied in sec. 67 of our Bankruptcy Act. For a discussion of these principles, see Williams' Law and Practice in Bankruptcy, 13th ed., pp. 253 *et seq.*, and particularly the summary at p. 256.

Many of the difficulties which had arisen in England were overcome in 1914, when the earlier Bankruptcy Acts were super-

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seded by the Act of that year, 4 & 5 Geo. V. ch. 59, by the enactment of sec. 39, which provided that, when a second or subsequent receiving order had been made against an undischarged bankrupt, property acquired by him since he was last adjudged bankrupt, and which had not been distributed amongst the creditors in the last preceding bankruptcy, should vest in the trustee in the subsequent bankruptcy, any unsatisfied balance of the debts provable under the earlier bankruptcy being admitted to proof in the subsequent bankruptcy by the earlier trustee.

One of the consequences of this enactment was to permit those who had become creditors of the undischarged bankrupt to share with the earlier creditors in the distribution of the after-acquired property in cases where they would have been completely excluded before 1914.

Where our Bankruptcy Act follows so closely in most of its provisions the lines of the English Act of 1914, why the provisions of sec. 39 of that Act were not embodied in ours, I do not know. Had they been, we should not be troubled with the difficult problem now confronting us.

There can be no doubt that in England, prior to 1914, the after-acquired property of the undischarged bankrupt passed to the trustee in bankruptcy, except in the cases I have mentioned, and that, when the trustee had reduced the property into possession, it was available for distribution among the creditors who had proved in the bankruptcy in exactly the same way as if it had been acquired prior to the bankruptcy, and to the exclusion of the subsequent creditors. This is clear from the judgment of the Court of Appeal in *In re Clark, Ex p. Beardmore*, [1894] 2 Q.B. 393. The judgments of Lord Esher, M.R., and Lords Justices A. L. Smith and Davey, are particularly illuminating.

They dispose effectively of one of the arguments which was pressed and which seemed to impress some of the members of this Court, namely, that there was some equity in the claims of the subsequent creditors because they had by extending credit to the bankrupt created the after-acquired assets. No such principle as this had ever been established under the English Bankruptcy laws, and the effort to introduce it in the case just cited did not succeed. Lord Esher, at pp. 402 and 403, explodes the theory that those who by the extension of credit have "created" an asset are entitled to some special claim against that asset, by comparing the position of a subsequent creditor with that of a vendor who, having sold goods upon credit immediately before the bankruptcy, sees the very goods he sold swept into the bankruptcy for the benefit of all the creditors. And he points out that the rights of the earlier as against the later creditors do not depend upon any

abstract principle of justice, but upon the true construction of the Bankruptcy Act.

Whatever injustice to the later creditors resulted from that state of the law was remedied in England in 1914 by the enactment of sec. 39 of the English Act. So far as our Act is concerned, I think it is quite clear that the law as to the respective rights of the original and the subsequent creditors in the after-acquired property of an undischarged bankrupt is substantially the same as it was in England prior to 1914, unless there is some provision in our Act indirectly (for it is clear that there is nothing directly) modifying that law.

The only thing which is really argued as having that effect is the discharge of the trustee. And Rose, J., has given effect to that argument. He holds that the trustee, having been discharged, had no status to intervene, that what was done by way of appointment or reappointment of the discharged trustee was ineffective, that there was in consequence no trustee in whom the after-acquired property could vest, and that, there having been a second receiving order made against the bankrupt, the property can be better distributed by the trustee under the second bankruptcy.

The result of this decision is, of course, practically to bring into effect, without any statutory authority for it, just what the enactment of sec. 39 of the English Act accomplished in England in 1914. But it would be an extraordinary anomaly if that result were merely dependent upon the absence of a trustee, so that the after-acquired property of an undischarged bankrupt would be divided into two categories, namely, (a) that which if reduced into possession by the trustee before his discharge would be available for distribution among the old creditors to the exclusion of the new, and (b) that not so reduced into possession being available for distribution among all the creditors both old and new. There is nothing in the Act itself to indicate that the mere discharge of the trustee was intended to have any such automatic effect upon the destination of the bankrupt's after-acquired property, and I cannot think that any construction of the Act which leads to that extraordinary result can be sound.

The discharge of the trustee is not really a voluntary act on his part. It is true he applies for it, but that is because, under subsec. 7 of sec. 86, he is penalised if he does not make such application within 30 days after the payment of the final dividend, that is after the final distribution of all the assets which have come to his hands. To argue, as was done here, that the discharge of the trustee under these circumstances constitutes some sort of acquiescence in an undischarged bankrupt's again embarking in

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business and acquiring assets and incurring debts, and thereby cutting down the claims which the creditors in the bankruptcy would otherwise have in the after-acquired property, tends to defeat the express provision in sec. 23 of the Act (subject, of course, to any rights acquired under sec. 67) that the property of the debtor divisible among his creditors shall include "all property which may be acquired by or devolve upon him before his discharge."

It cannot have been the intention of the Act that the sweeping provisions of sec. 23 as to the right of the creditors to after-acquired property is to be prejudicially affected by the formal discharge of the trustee. Unless driven to any such conclusion by the Act itself, I cannot assent to such a disposition of the question before us as will lead to any such result.

I think it must be that after his discharge the trustee has no further duty to perform and no right until re clothed with authority to intervene in the affairs of the undischarged bankrupt. But it cannot be called an improper intervention for him to come to the Court and disclose the discovery of further property belonging to the bankrupt. There can be no difference in this respect between property owned by the bankrupt before his bankruptcy and that acquired afterwards. If the former trustee were to discover some piece of realty or a balance in the bank which the bankrupt had failed to disclose, would it be an unwarranted intervention for him to inform the Court? Even though discharged, there would be at least a moral duty to inform some one, so that justice might be done.

When the former trustee, upon discovering the after-acquired assets, applied for directions, the order of the 5th October, 1928, made by the Registrar, speaks of the applicant as the "authorised trustee," but it also recites that he had been discharged from the performance of further duties and obligations and that the security given by him had been released and discharged. The order then goes on to direct that Stephenson "the authorised trustee of the said estate" upon giving security shall take possession of and administer all the after-acquired assets, etc.

It is argued, and the learned Judge has held, that this order did not operate as a reappointment of Stephenson as trustee. With this I cannot agree. It is true that it does not in precise terms reappoint him. But suppose it were some other form of instrument, and that, after describing a named person (who had been a trustee but had resigned) as trustee, it went on, as this order does, to empower him to take possession of the trust estate and to give him "all rights, powers, and duties which, with relation to

such estate generally, he originally had upon his original appointment as authorised trustee thereof," how far would the argument that the instrument failed to appoint or reappoint a trustee get in any court? It might have been better had the order expressly reappointed Stephenson as trustee, but if an order which describes him as trustee and orders him to take possession of the property in question, and empowers him to do everything with it that a trustee could do, does not constitute him a trustee, then I shall have to give up trying to understand plain English. In my opinion the order of the 5th October, 1928, effectively restored Stephenson to the trusteeship of the estate.

That being the case, the foundation for the refusal to allow Stephenson to administer the after-acquired assets disappears. In my opinion, the order of Rose, J., of the 21st March, 1929, now in appeal, should be set aside and the order of the Registrar of the 5th January, 1929, should be restored, with costs here and below.

That this conclusion operates harshly as against the subsequent creditors is, of course, apparent. But the policy of Bankruptcy laws has always been to prevent bankrupts while undischarged from re-engaging in trade. People who sell goods to undischarged bankrupts do so at their peril and are not entitled to much sympathy when the peril becomes a reality.

Appeal dismissed (ORDE, J.A., dissenting).

[APPELLATE DIVISION.]

LUND V. WALKER.

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Appeal—Jurisdiction—Judgment Pronounced on Consent of Plaintiff—Dismissal of Action with Costs — "Made with the Consent of Parties"—Judicature Act, R.S.O. 1927, ch. 88, sec. 23.

The judgment or order pronounced at the trial of an action, and afterwards issued, recited that the action came on for trial without a jury, in the presence of counsel for all parties, and that, upon hearing read the pleadings and hearing the evidence adduced and what was alleged by counsel, "and the plaintiff by his counsel consenting." This was followed by the words: "This Court doth order and adjudge that this action be and the same is hereby dismissed as against all of the above named defendants," and "This Court doth further order and adjudge that the plaintiff do pay to the defendants their costs of this action." Nothing was said as to the consent of the defendants, and in fact one of them objected:—*Held* (RIDDELL, J.A., dissenting), that the judgment or order was not an order "made with the consent of parties," within the meaning of sec. 23 of the Judicature Act, and therefore was appealable.

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AN appeal by the plaintiff from the judgment of LOGIE, J., pronounced upon consent of counsel for the plaintiff at the trial, dismissing the action.

November 6, 1929. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

W. N. Tilley, K.C., and *O. E. Fleming*, K.C., for the appellant, stated that they relied not only on the case as generally presented at the trial, but also on the fact that certain consents given by counsel at the trial were not authorised, and they wished to file material to shew the want of authorisation.

At this point *Glyn Osler*, K.C., and *Harrington Walker*, for the defendants, respondents, raised a preliminary objection that the Court had no jurisdiction to hear the appeal because sec. 23 of the Judicature Act, R.S.O. 1927, ch. 88, precludes an appeal where the judgment *à quo* is a consent judgment within the meaning of that section.

Tilley, K.C., in answer to the objection, argued that the appellant was not precluded from appealing in the circumstances of the case. To make consent, there must be some kind of an arrangement between the parties to the litigation. There must be mutuality. In this case there was no consensus *ad idem*. The judgment was pronounced upon the consent of the plaintiff, but without the consent of the defendants: *Royal Bank of Canada v. Skene* (1919), 59 Can. S.C.R. 211; *Hickman v. Berens*, [1895] 2 Ch. 638; Holmsted's Judicature Act, 4th ed., p. 111; *Aldam v. Brown*, [1890] W.N. 116; *Hadida v. Fordham and Sons Ltd.* (1893), 10 Times L.R. 139; *Holt v. Jesse* (1876), 3 Ch. D. 177; *Shepherd v. Robinson*, [1919] 1 K.B. 474; *Little v. Spreadbury*, [1910] 2 K.B. 658, at p. 664; *Ainsworth v. Wilding*, [1896] 1 Ch. 673. If the judgment should be deemed a consent judgment, the plaintiff should be given leave to appeal.

Osler, K.C., in reply as to the objection, contended that "consent" in sec. 23 of the Judicature Act means consent of any party. No appeal can be had by a consenting party. Mutuality is not necessary: *Neale v. Gordon Lennox*, [1902] A.C. 465. The consent, if it is to be set aside, should be as set aside upon evidence taken at a trial, and not by this Court upon affidavits.

January 17, 1930. MASTEN, J.A.:—Appeal by the plaintiff from the judgment of Logie, J., dated the 7th May, 1929, dismissing the action on the consent of the plaintiff.

At the opening of this appeal a preliminary objection was taken on behalf of the respondent that sec. 23 of the Judicature Act, R.S.O. 1927, ch. 88, precluded any appeal because the judg-

ment *à quo* is a consent judgment within the meaning of that section. Whereupon the Court directed that the preliminary objection should first be argued, and after argument reserved judgment on the objection and also reserved further consideration of the appeal until after the preliminary objection had been disposed of.

The question so raised is important, involving as it does the construction of sec. 23 of the Judicature Act of Ontario, R.S.O. 1927, ch. 88, and the interpretation of the phrase "order made with the consent of parties."

The order in question, so far as material to the point now under consideration, reads as follows:—

"1. This action coming on for trial this day before this Court, at the sittings holden at London for the trial of actions without jury, in the presence of counsel for all parties; upon hearing read the pleadings and hearing the evidence adduced and what is alleged by counsel aforesaid and *the plaintiff by his counsel consenting*:—

"2. This Court doth order and adjudge that this action be and the same is hereby dismissed as against all of the above named defendants.

"3. And this Court doth further order and adjudge that the plaintiff do pay to the defendants their costs of this action forthwith after taxation thereof."

The defendant Harrington Walker did not consent to the terms of the judgment in so far as it recites that it is issued on consent of the plaintiff. His reason is obvious. Grave charges having been made against him personally in the statement of claim, he insisted on a plain dismissal of the action with costs, so that no suggestion might ever arise that the plaintiff had been bought off by or through him. Hence the neat question to be decided is whether a judgment purporting on its face to be issued on consent of the plaintiff only, but against the protest of a defendant, is an order made with the consent of parties within the meaning of sec. 23. That section reads as follows:—

"No order of the High Court Division or of a Judge thereof made with the consent of parties shall be subject to appeal, and no order of the High Court Division or of a Judge thereof as to costs only which by law are left to the discretion of the Court shall be subject to appeal on the ground that the discretion was wrongly exercised, or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the court or judge making the order."

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Masten, J.A. one party.

In my opinion, the judgment or order in question is not an order made with the consent of parties, for it was made on the consent of the plaintiff but not with the consent of the defendant Harrington Walker. I cannot bring myself to think that an order made by "consent of parties" means an order made by consent of

The discussion reminds one of Lord Dundreary's remark in Sothorn's famous play, where he criticises the old proverb "Birds of a feather flock together." "Of course they flock together," he says, "How could one poor little bird flock all by itself?" And so how can one party consent all alone? Surely he must consent with another so that by agreement there arises a consensus. But, if it is suggested that the plaintiff consented with the Court to the dismissal of the action, such consent does not fall within the words of the section, which are "with the consent of parties," and the Court is not a party. It seems to me that the words "consent of parties" predicate at least two parties who concur in agreeing to the specific terms of the judgment as settled and entered.

The view which I have just expressed is confirmed by the cases which have been decided under the corresponding provision in the English Judicature Act. That provision (sec. 31 of the Judicature Act of 1925) reads as follows:—

"No appeal shall lie, without the leave of the Court or Judge making the order, from an order of the High Court or any Judge thereof made with the consent of the parties."

Referring to that provision, it is said in Daniell's Chancery Practice, 8th ed., p. 1110: "To constitute consent there must be a bargain between the parties, and not a mere acceptance of the order offered." In the Annual Practice of 1929, p. 2141, the result of the cases is expressed in identically the same terms, and in support of the statement there are quoted the following cases: *Davis v. Chanter* (1848), 2 Ph. 545; *Aldam v. Brown*, [1890] W.N. 116; and *Hadida v. Fordham and Sons Ltd.*, 10 Times L.R. 139. I have perused and considered these cases, and they appear to me to bear out the conclusion expressed in the text-books. I have failed to find in our own reports any judgment indicating a different view.

For these reasons I am of opinion that the order appealed from is not an order "made with the consent of parties" within the purview of sec. 23 of the Ontario Judicature Act, and that the preliminary objection should be disallowed and the appeal heard on the merits.

A further question was argued as to whether the final words of sec. 23, "except by leave of the Court or a Judge making the

order," apply to an order made with the consent of parties. If I am right in the view which I have first expressed, this question becomes immaterial, but I ought, perhaps, to say that I have been unable to persuade myself that the Legislature had a deliberate intention of taking away the right of appeal against a consent order where upon application for leave it appeared to be a case in which justice demanded that leave should be granted.

The long controversy over the interpretation of sec. 7 of the Canada Patent Act, which was finally determined by the Privy Council in the case of *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ltd.*, [1929] A.C. 269, at p. 283 *et seq.*, shews how little weight is to be attached to grammatical rules when opposed to other considerations; and the historical argument respecting the changes in what is now sec. 23 of the Judicature Act, as presented to us by Mr. Tilley, has convinced me that the final clause of sec. 23 does apply to orders made with the consent of parties.

If the view which I have first expressed does not prevail, then opportunity should be afforded to the appellant to apply for leave to appeal.

ORDE and FISHER, JJ.A., agreed with MASTEN, J.A.

LATCHFORD, C.J.:—I have had the advantage of reading the opinion of my learned brother Masten on the preliminary objection to the appeal, and agree that the judgment is not an "order made with the consent of the parties." One defendant not only did not consent, but expressly refused to consent to the order made.

I would overrule the objection taken, and direct that the appeal proceed—costs in the cause to the plaintiff in any event of the appeal.

RIDDELL, J.A.:—This is an appeal from the judgment of Mr. Justice Logie at the trial, given, as it is claimed, by consent; we called for argument upon the question whether this Court has jurisdiction under the circumstances to entertain the appeal. This point was fully and ably argued and is now to be decided.

The legislation to be interpreted is R.S.O. 1927, ch. 88, sec. 23, which reads:—

"23. No order of the High Court Division or of a Judge thereof made with the consent of parties shall be subject to appeal, and no order of the High Court Division or of a Judge thereof as to costs only which by law are left to the discretion of the Court shall be subject to appeal on the ground that the discretion was

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wrongly exercised, or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the court or judge making the order."

It is contended by the appellant (1) that the present is not the case of "an order . . . made with the consent of parties" within the meaning of the Act, and (2) that, if it is, an appeal may be had "by leave of the . . . Judge making the order," and we should adjourn the hearing of the appeal to give him an opportunity to obtain such leave.

It will be convenient to examine the latter proposition at once.

The original legislation is to be found in the Ontario Judicature Act, 1881, 44 Vict. ch. 5, sec. 32, in the following language taken from the English Act:—

"32. No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court, or Judge, making such order."

The same language was employed in subsequent legislation and revision, appearing for the last time as R.S.O. 1897, ch. 51, sec. 72. The Legislature in 1913 made a change in the provisions prohibiting appeals by the Act 3 & 4 Geo. V. ch. 19, sec. 24, introducing the present wording, which was continued in R.S.O. 1914, ch. 56, sec. 24.

It is an elementary rule of law as of logic that a change in terminology *primâ facie* indicates a change in meaning; and here it seems to me the change in terminology is most significant. In the former legislation, there is obviously one genus of case in which an appeal is to be taken only by leave; in that genus are two species, viz. (1) orders made by "consent of parties," and (2) orders as to costs only which are left to the discretion of the Court. Concerning these two classes of orders, they are not to be subject to any appeal except by leave. In the present legislation there are two distinct classes of case, two genera, for each of which provision is made in a separate sentence with a separate subject and predicate, a separate nominative and a separate verb; in the former legislation we find but one subject and one predicate, one nominative and one verb, the provision for consent orders not being complete without the remainder of the single sentence. In the present legislation we find a full and complete provision made for consent cases, then an additional provision made for other cases, introduced by the conjunction "and," which to my mind clearly indicates a new and different class with new and different characteristics—not, as before, two species united by an "or" and having the same characteristics of non-appealability.

I am of opinion that the provision as to consent cases terminates with the logical predicate of the first sentence and the words "shall be subject to appeal," where they first appear.

In this connection it is not without significance that the Act of 1913 does not come by way of amendment of previous statutes; the previous statutes are expressly repealed, and this is a new and substantive Act: sec. 125. The underlying reason for different provisions for the two genera—where an order is made in the discretion of a Judge, it may well be that his reasons, the actuating reasons, are known only to himself, and he be not sure that his discretion has been rightly exercised—in such a case, it is eminently proper that there should be an appeal if the Judge permits it; but in the case of a consent order, with which the discretion of the Judge has or may have nothing to do, it is difficult to see why an appeal should be allowed in one case and denied in another, the right depending upon the permission of a Judge who had not exercised his discretion but simply carried into effect what had been agreed upon *aliunde*.

To the same conclusion impels the maxim, which has been characterised as a rule of logic and of law—I add, also of grammar and of common sense—*Ad proximum antecedens fiat relatio nisi impediatur sententia*, which will be found fully and accurately discussed in Broom's Legal Maxims, 9th ed., pp. 438, 439—and I do not say more than that by that rule, not, of course, universal and unyielding, the leave spoken of applies only to the immediately preceding class of case.

It seems to me that we can entertain no appeal in the case of an "order . . . made with the consent of parties," whether the appeal is or is not "by leave of the . . . Judge;" and that the leave of the Judge is effective to give us jurisdiction only in the latter mentioned class of case.

Whether, were the opposite conclusion to be arrived at, we should now stay the appeal to enable the appellant to obtain the leave of the trial Judge, under all the circumstances of the case I do not determine; nor do I consider the probability or the propriety of the trial Judge, after yielding to the urgent pressure of the plaintiff and against the will of the defendant, and directing the judgment to be entered as the plaintiff wished it in a form against which the defendant protested to the last, then on the request of the party who had induced him to direct judgment to be entered as on his consent, giving leave to him to appeal from the judgment he had asked for—without making any adjudication. I would say that this would savour of absurdity and great unfair-

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App. Div. ness to the party upon whom the judgment was, at the instance
1930. of the appealing party, forced.

 The first question remains for decision, viz., is the present a
LUND judgment within the meaning of the section, under the words
v. "order made with the consent of parties?"
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Riddell, J.A. Mr. Tilley candidly admitted that such a judgment is an
 "order" within the meaning of the section; and that point need
 not be discussed further than to say that the section has been
 uniformly so construed in our Courts. The judgment as taken out
 by the defendant, including the recitals, reads as follows:—

 "1. This action coming on for trial this day before this Court,
 at the sittings holden at London for the trial of actions without
 jury, in the presence of counsel for all parties; upon hearing read
 the pleadings and hearing the evidence adduced and what is alleged
 by counsel aforesaid, and the plaintiff by his counsel consent-
 ing:—

 "2. This Court doth order and adjudge that this action be and
 the same is hereby dismissed as against all of the above named
 defendants.

 "3. And this Court doth further order and adjudge that the
 plaintiff do pay to the defendants their costs of this action forth-
 with after taxation thereof."

 It will be observed that in the recital or preamble (not in the
 operative part) it is stated, "the plaintiff by his counsel consent-
 ing." In the case *Re Justin, a Solicitor* (1898), 18 P.R. 125, the
 head-note reads: "There can be no appeal from an order, appear-
 ing on its face to be made by consent, unless by leave of the Court or
 Judge making it, even though the appeal is on the ground that no
 consent was given." The printed report not containing sufficient
 to justify the head-note, I, early in my judicial life, took occasion
 to inquire of the late Chancellor whether the Divisional Court had
 decided in that case that, if the order from which appeal was to be
 taken appeared on its face to be made by consent, the Court would
 so consider it without regard to what was alleged; I was assured
 that such was the decision of the Court, and I followed it, against
 my own opinion, formed after great consideration. We are in this
 Court not bound by the decision of a Divisional Court under the
 former practice; and I have no hesitation in expressing my opinion
 that the rule above stated cannot be sustained. I think that the
 Court is not concluded by the form of the order, but can—and, if
 necessary, should—examine the proceedings resulting in the order
 to determine whether the order was such an order as stated.
 I think that in the present case we should examine the proceedings

at the trial and determine for ourselves what the fact is; and I accede to that extent to the argument of Mr. Tilley.

Turning now to the proceedings at the trial, we find that after the learned Judge, Mr. Justice Logie, had ruled out some evidence, which the plaintiff was offering, it is stated that:—

“(Mr. Grant and Mr. Osler (leading counsel for plaintiff and defendant respectively) at this point had a discussion with his Lordship, which was inaudible to the reporter, following which his Lordship retired to his room, and Mr. Osler and Mr. Grant had a discussion between themselves. His Lordship returned to the bench at 10.25 a.m.)

“Mr. Grant: We have arranged that matter, my Lord. I wish my friend would consent to our withdrawing the record on our undertaking to pay costs.

“Mr. Osler: I have explained to my friend that my client could not be party to any settlement of this action.

“His Lordship: Well, by consent, action dismissed with costs.

“Mr. Osler: Not by consent, my Lord.

“Mr. Grant: I am consenting.

“His Lordship: Have you finished your case?

“Mr. Grant: Yes, my Lord.

“His Lordship: Then I will dismiss it with costs.

“Mr. Grant: No, no, I don't want that, my Lord.

“Mr. Osler: Well, I am afraid that is the only thing I can do.

“Mr. Grant: My friend wants to destroy my chance of getting anything. I said I would consent to the dismissal of the action; I am consenting.

“Mr. Osler: I have explained to my friend, both I and my client have great sympathy for my learned friend's client in the circumstances, but, having regard to the charges that were made in the pleadings and in the newspapers—

“Mr. Grant: I will withdraw those charges.

“Mr. Osler: I cannot consent to anything but the dismissal with costs.

“Mr. Grant: Well, I will consent to a dismissal with costs, if we can't get any other terms.

“Mr. Osler: If my learned friend withdraws the charges—

“Mr. Grant: I said that I would do that.

“His Lordship: Yes, he said he withdrew them.

“Mr. Osler: Then I ask for a dismissal of the action with costs.

“Mr. Grant: Yes, by consent.

“Mr. Osler: I ask for it. I am entitled to it as a matter of right.

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App. Div. "Mr. Grant: I have not argued my case yet. Surely we are
 1930. consenting to what is being done now.
 LUND "Mr. Osler: I am insisting upon my rights.
 v. "His Lordship: Well, this action is dismissed with costs.
 WALKER. "Mr. Grant: Will your Lordship say by consent—by consent
 Riddell, J.A. of the plaintiff.

"Mr. Osler: I thought it might not have been inappropriate in the circumstances that my learned friend's client should apologise for having made the charges. That is for my learned friend to say.

"His Lordship: Mr. Grant withdraws all charges. In fact, in the box there were no charges.

"Mr. Osler: There were no charges in the box.

"His Lordship: I could see quite plainly that the plaintiff hesitated to bring a charge of actionable non-disclosure or anything of that kind against his—

"Mr. Grant: My Lord, I have not argued my case, and surely—

"His Lordship: I know. Well, what are you going to do? I have endorsed the record: 'This action is dismissed with costs.'

"Mr. Osler: I would only suggest to my learned friend that he might consider the advisability of apologising for having made the charges, but that is entirely for him and his client.

"His Lordship: If you like I will add the words 'by consent of the plaintiff.'

"Mr. Grant: That is what I ask, my Lord.

"His Lordship: Well, there is no harm in that that I see.

"Mr. Osler: My Lord, may we have our exhibits out?

"His Lordship: Yes, certainly, the order may go."

We are told that Mr. Winnett, junior counsel, as well as solicitor, for the plaintiff, did not consent to this, but did not make open objection to the Court, supposing that he had no right to take a position opposed to that of his leader. Some years ago the matter was much discussed and of much interest. This was due, to a great extent, to the proceedings in the Privy Council in *International Bridge Co. v. Canada Southern Railway Co.* (1883), 8 App. Cas. 723. The point is not mentioned in the official report, but a fairly full report of the case upon this point is in 19 C.L.J. 358. In the Court of Appeal (1882), 7 A.R. 226, it was said "that junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their senior counsel" (p. 228). In the Judicial Committee, according to stenographic report, of which there were many copies made at the time in Ontario, the fact (if it was a fact) that the junior had obtained the leave of his senior was not mentioned, and formed no part for the foundation for the remarks of the Lord Chancellor, as reported

on p. 358 of 19 C.L.J. It was the impression at the time that the Privy Council considered that junior counsel had the same rights as senior counsel and were not bound to follow their leaders; and, speaking for myself, I think that junior counsel have the right—and with the right often the duty—to state their own views, however they may disagree with those of their leaders.

However, this discussion is academic. Junior counsel, sitting in Court hearing the discussion going on, took no means to bring to the attention of the Judge what he considered the rights of his client; but sat, so far as appears by the transcript of proceedings, in silence—silence is said to give consent, and consent should be considered as given in the present case—at least, so far as that may affect the position of the defendant, who knew nothing of the want of assent and was strenuously resisting any reference to consent in the judgment. *De non apparentibus et non existentibus eadem est ratio.*

I am of the opinion from an examination of the proceedings at the trial that the plaintiff must be held to have been consenting to the judgment—it may be that a judgment would have been given dismissing the action without any such consent; and the intimation of opinion by the trial Judge would seem to be reasonably conclusive in that view; but no expression of opinion, no expression of intention, however strong and positive, is the judgment of the Judge; he is not bound by any such expression made during or after the trial, or even by his endorsement of the record or settling the form of the judgment—he has the right to change his mind after all that, and does not become *functus officio* until the judgment has “passed the seal,” i.e., has become the judgment of the Court.

Influenced, rightly or wrongly, by the strenuous pressure of the plaintiff through his counsel, the Judge finally directed that the judgment should go dismissing the action by the consent of the plaintiff.

We must examine with care the precise terminology of the Act to see exactly what is meant. The section does not say “No order . . . based on the agreement of the parties,” so as to require an agreement between the parties to come within the rule—nor does it say “No order . . . based upon the consent of the parties,” so as to exclude every order from the operation of the section which is not the product of such consent—all that is required is that the order is made with the consent of parties, that such consent is a concomitant of the order, not necessarily that it is the cause or basis of the order. Nor does it say “by and with the consent, etc.” If the Judge has fully made up his mind as to the order he will

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App. Div. make and so states to the parties, and then the parties say they
1930. consent to the order he has determined to make, the order is as
truly and as fully made *with* the consent of the parties as if the
LUND parties, before the Judge had made up his mind, had got together,
v. made an agreement, and communicated to the Judge the order they
WALKER. had agreed upon. The section says in effect: "You must not blow
Riddell, J.A. hot and cold; if at any time before the order is actually made and
while you are in a position to protest against it, you express your
consent to it, you cannot afterwards effectually withdraw that
consent and appeal from the order to which you consented."

Nor do I think that the section covers only such orders as both parties consent to; I read the language as precluding any one who consents to an order from afterwards questioning it, from afterwards appealing from it—any other interpretation, it seems to me, would result in an absurdity, allowing a party to ask for a particular judgment, to press for it, and then turn round and contend that what he asked should never have been granted. Could absurdity be carried to a greater height? I decline to consider that the Legislature could possibly have meant anything so absurd.

That the section reads "consent" and not "agreement" or similar language has some significance; but I am content to base my judgment on the glaring absurdity of permitting any one who has asked for a judgment to contend in an appeal that his request should not have been granted. Even if the consent of both parties were considered necessary, I think this consent is found in the present case. Mr. Osler was contending for a judgment dismissing the action, *simpliciter*, Mr. Grant was asking that the consent of the plaintiff should be noted, and so the Judge directed; but the operative part of the judgment, the judgment proper, the judgment in law, is a dismissal of the action *simpliciter*; it is true that the consent of the plaintiff is noted in the recitals or preamble, but that is no part of the operative judgment, and may be neglected.

Nothing in this judgment should preclude the plaintiff taking any proceedings he may be advised to get rid of the effect of the consent given by his counsel.

For the reasons stated, I am of opinion that we have no jurisdiction to entertain this appeal; and it should be dismissed with costs.

Appeal allowed (RIDDELL, J.A., dissenting).

[APPELLATE DIVISION.]

RE DOMINION COMBING MILLS LTD.

1930.

Jan. 17.

Company—Winding-up—Shareholder—Whether Properly made Contributory—Contract—Consideration—Inquiry as to Adequacy.

An agreement was entered into between two joint-stock companies, the C. company and the D. company, whereby the D. company was to receive all the C. company's stock, preferred and common, for certain lands, buildings, and machinery, and \$200,000 cash to supply the C. company with working capital. The D. company did not subscribe for the C. company's stock in the ordinary way—it entered into no undertaking to pay for the shares it was to get according to their full par value in cash or to be subject to calls thereon. In the books of the C. company appeared a statement indicating (by the inclusion of a sum for "goodwill") that the company was getting full face-value for its stock; but that was no part of the contract between the companies. The D. company carried out its undertaking and gave the C. company all that was agreed upon. The C. company having been ordered to be wound up and the D. company having made an authorised assignment in bankruptcy, the Master in the winding-up proceedings declared the trustee in bankruptcy of the D. company, as the holder of shares which had not been paid for, to be a contributory, and this was affirmed by a Judge:—

Held, upon appeal, that, the agreement not having been set aside, the adequacy of the consideration could not be inquired into in this winding-up proceeding, and the liquidator of the C. company could not impeach the instrument which embodied the transaction and at the same time seek to enforce it.

The shares were therefore to be considered as fully paid and the trustee was not liable as a contributory.

Review of the authorities.

In re Wragg Ltd., [1897] 1 Ch. 796, specially referred to.

AN appeal by the trustee in bankruptcy of the Dominion Development Corporation from an order of KELLY, J., dismissing the appellant's appeal from the order of the Master in a winding-up proceeding declaring the appellant a contributory in respect of 8,075 shares of the common stock of Dominion Combing Mills Ltd., valued at \$363,375.

December 2, 1929. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

J. M. Macintosh, for the appellant, argued that the trustee in bankruptcy of the Dominion Development Corporation should not have been made a contributory in respect of 8,075 shares of the common stock of the Dominion Combing Mills Ltd., in the winding-up of the latter company, because these shares were issued to the Development Corporation as fully paid-up, and were in fact fully paid for by the Development Corporation. As the liquidator of Dominion Combing Mills affirms the contract between the two companies in respect of the shares in question, he must abide by its terms: *Palmer's Company Precedents*, 13th ed., part II., p.

App. Div. 573; Masten & Fraser's Company Law, 3rd ed., pp. 1083 and 1084;
 1929. *In re Wragg Ltd.*, [1897] 1 Ch. 796; *In re Almada and Tirito Co.*
 (1888), 38 Ch. D. 415; *Toronto Finance Corporation Ltd. and*
 RE *Cook v. Banking Service Corporation Ltd.* (1925-6), 57 O.L.R. 514,
 DOMINION 59 O.L.R. 278; *Banking Service Corporation Ltd. v. Toronto*
 COMBING *Finance Corporation Ltd.*, [1928] A.C. 333; *Lindsay v. Imperial*
 MILLS LTD. *Steel and Wire Co.* (1910), 21 O.L.R. 375; *Arnot's Case* (1887),
 36 Ch. D. 702; *In re Macdonald Sons & Co.*, [1894] 1 Ch. 89.

G. N. Shaver, K.C., for the liquidator of the Dominion Combing Mills Ltd., respondent, contended that, as the bargain between the two companies was an unreasonable one, in that the Development Corporation did not give adequate consideration for the shares, it was *ultra vires* the Dominion Combing Mills Ltd., and the trustee was properly made a contributory: *In re Alkaline Reduction Syndicate Ltd.* (1896), 45 W.R. 10; *In re James Pilkington & Co. Ltd.* (1916), 85 L.J. Ch. 318; *In re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191; *Ex p. Sandys* (1889), 42 Ch. D. 98; *In re Theatrical Trust Ltd., Chapman's Case*, [1895] 1 Ch. 771; *In re Almada and Tirito Co.*, 38 Ch. D. 415; *Union Bank v. Morris* (1900), 27 A.R. 396.

January 17. FISHER, J.A.:—This is an appeal from the judgment of Kelly, J.

Shortly, the facts are these: The Dominion Combing Mills Ltd. was on the 17th March, 1921, incorporated under the Ontario Companies Act, and at that time had no assets. This company had the right to issue 10,000 preferred shares of \$100 each, and 30,000 common shares at \$50 each, a total capitalisation of \$2,500,000. The Dominion Development Corporation was also incorporated under the Ontario Companies Act, in 1921, and it, too, had no assets.

On the 14th June, 1921, these two companies entered into a written agreement under the terms of which the development corporation, described therein as the "vendors," agreed to procure a leasehold site in Toronto for the purpose of erecting a plant for the combing company; to erect a factory at a cost of not less than \$200,000; to equip the factory with machinery, etc.; to discharge all liens, etc., thereon; and to pay the combing company \$200,000 in cash for working capital.

The combing company, described as the "purchasers," in consideration of the covenants contained in this agreement, agreed forthwith to issue and allot to the development corporation 10,000 fully paid-up and non-assessable preferred shares, of the par value of \$100 each, and 30,000 fully paid-up and non-assessable common

shares of the company, of the par value of \$50 each. The combing company, by by-law of the directors and the shareholders, ratified this agreement on the same day as the agreement was entered into.

Apart from a subsequent agreement dated the 7th January, 1924, agreeing to change the site, which was to be in the Toronto Harbour, to Trenton, Ontario, and accepting certain machinery in lieu of that referred to in the same agreement, it is admitted that the agreement was carried out, and in consideration therefor the combing company issued and allotted all its stock, both preferred and common, to the development corporation; that that company paid in cash, procured a factory and equipment and the machinery, etc., in all of the value of \$1,149,980.02; and thereafter the combing company carried on business at Trenton, Ontario, until a liquidator was appointed by order dated the 10th February, 1928.

On the 17th December, 1928, the development corporation made an authorised assignment in bankruptcy. In the course of the winding-up of the combing company, the trustee of the development corporation, in his representative capacity, was listed as a contributory for 40,000 common shares of the combing company, upon which it is claimed there was unpaid and due the sum of \$350,019.98.

The Master, Mr. Garrow (now Mr. Justice Garrow), on the matter coming before him, found, for reasons given in writing, that the preferred shares must be considered as fully paid, but "that the common shares should be treated as being paid only to the extent of \$149,980.82, being the difference between the value of the benefits received and the face value of the preferred shares," and, following *Toronto Finance Corporation Ltd. and Cook v. Banking Service Corporation Ltd.*, 57 O.L.R. 514, 59 O.L.R. 278, and *Banking Service Corporation Ltd. v. Toronto Finance Corporation Ltd.*, [1928] A.C. 333, and what was said by Ferguson, J.A., at p. 283 of 59 O.L.R., placed the trustee of the development corporation on the list of contributories as being the holder of 8,075 common shares, valued at \$363,375, which had not been paid for.

From the Master's order an appeal was taken before Kelly, J., and he, for the reasons given by the learned Master, dismissed the appeal.

The contest resolves itself into a claim made by the liquidator of the combing company under the Winding-up Act, against the trustee of the development corporation under the Bankruptcy Act, and the sole question for determination is: was there anything due by the development corporation to the combing company on any of

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1930. liquidation, and, if so, how much?

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No fraud or collusion is suggested in connection with the agreement, and the transaction is not attacked as *ultra vires* under sec. 102 (2) of the Ontario Companies Act, R.S.O. 1927, ch. 218.

Fisher, J.A. What counsel for the liquidator now complains of is, that the *bargain* these two companies entered into was an unreasonable one, or, in other words, the development corporation did not give adequate consideration for the combing company's shares.

The serious difficulty in the way of the liquidator is, that he is faced with an agreement that has not been attacked, and until it is set aside must be considered as binding. The effect of what the Master did was to alter the terms of the agreement by reading into it something that was not there. It may be that, had the agreement been attacked by the liquidator on the ground that there was a deliberate attempt to issue the shares of the combing company at a discount, contrary to sec. 102 (2) of the Companies Act, it would have been declared *ultra vires*, but, until that has been done, what possible right can there be in a winding-up proceeding in the Master's office for the Master to ignore the terms of the agreement and set up a new one?

It appears from the reasons of the Master and the observations of Kelly, J., in appeal, that there was found in the books of the combing company, after the agreement was entered into, an item of \$1,350,019.19 as an asset, under the head of goodwill, when in fact there was no goodwill, and it has held that, because there was no goodwill, there was adequate consideration only for the preferred shares and a sum equivalent to \$5 on the common shares; but without some evidence why should the learned Master have assumed that the development corporation was a party to or had any knowledge of this entry, and, until it has been proved that the development corporation was a party to the making of that entry of goodwill, what right is there to say that the development corporation's purchase should be affected by the entry of goodwill?

So far as I can discover, the Master had no evidence whatever, other than the item of goodwill, upon which he could arrive at a conclusion as to what amount, if any, there was owing on the shares, either preferred or common. The agreement of purchase, which had stood for a period of nearly 7 years and until the winding-up order was made, was admitted by the combing company to have been fully performed, and no fraud or collusion was suggested in the making of it; and, if the liquidator stands in no higher position than the company he represents—as he does not—how is it possible to find that a debt of \$363,000 now exists as due and

unpaid on these shares under that agreement? In my view the learned Master seems to have taken an impossible position in ignoring the agreement on the one hand and at the same time making use of it to create a liability thereunder. Even if the terms of the agreement could have been considered by the Master in the winding-up proceedings, I confess I should have had some difficulty in coming to the conclusion that the development corporation had not given adequate consideration for the shares, both preferred and common, because, at the time of the purchase, the development corporation had no assets nor any business, and it was only from the moneys subsequently paid and the equipped factory delivered that the combing company was able to establish and to continue its business until the winding-up order was made; and, as it now turns out, the combing company having gone into liquidation, the holders of the stock, whoever they may be, have lost everything by the transaction.

I am unable to find any evidence of proof by the liquidator, in the record agreed upon by counsel as containing all the facts, as to what number of shares, either preferred or common, the development corporation held at the time of the liquidation of the combing company, and there are no entries whatever to be found in the combing company's books shewing that the development corporation was entered as a shareholder.

Whether the transaction between these two companies was in point of fact one, and whether or not the agreement would have been set aside as *ultra vires* had proceedings been taken, as was done in the *Toronto Finance Corporation* case, *supra*, the agreement as executed must stand and its terms cannot be altered summarily in the present winding-up proceedings. The combing company had a right to sell and the development corporation to purchase the shares; and, so long as that agreement has not been impugned in an action to set it aside, the value placed upon it by the parties to it, as a consideration for the sale and purchase, will be accepted by the Court and the Court will not examine into the adequacy of the consideration. See *Pell's Case* (1869), L.R. 5 Ch. 11; *In re Wragg Ltd.*, [1897] 1 Ch. 796; and the many other cases referred to in Masten & Fraser's Company Law, 3rd ed. (1929), pp. 177 and 1084.

The appeal must be allowed with costs here and below, and the development corporation's name removed from the list of contributories.

RIDDELL, J.A.:—I would dispose of this appeal upon the plainest, most elementary, and most firmly established rules of Equity,

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1930. it—that is, that the Court will not make a contract for the parties,
but will, if proper, set a contract aside, insisting that so long as the
RE contract is held in force, so long must the terms agreed upon by
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Riddell, J.A. I accept the facts as found—in distinction from the results
attached to the facts.

There are two joint-stock companies, one, the Dominion Comb-
ing Mills Ltd., and the other, the Dominion Development Corpora-
tion Ltd.—both apparently the projects of one and the same per-
son; this is, however, of no importance, *Salomon v. Salomon & Co.*,
[1897] A.C. 22, being conclusive in that respect.

The former company had not sold its stock; and an agreement
was entered into whereby the development corporation was to
receive all its stock, preferred and common, for certain lands,
buildings, and machinery along with \$200,000 cash to supply the
Combing Mills Company with working capital.

In the books of the Combing Mills Company appears a state-
ment apparently made up to indicate that that company was get-
ting full face-value for its stock, but no part of the contract
between the companies. It is because of this statement and of the
fact that there is a statement in it, valuing goodwill at \$1,350,-
019.96, that the Master has considered that the development cor-
poration must pay the liquidator of the combing company a large
sum.

It is perfectly plain, and, indeed, is not disputed, that the
development corporation has carried out its undertaking and has
given the combing company all that was agreed by the contract.

The liquidator of the combing company applied to have
the trustee in bankruptcy of the development corporation put on
his list of contributories, and this was done by the Master; and his
action has been sustained by my learned brother Kelly.

It seems clear that the applicant asserted the validity of the
contract already mentioned—there was no preliminary application
for and allotment of shares from which a debt would or might arise
or any other basis for making the trustee a debtor except this con-
tract. The case might be much different if such had been the case
and the parties had taken this means to settle the debt thus
incurred. Affirming the contract, the liquidator must abide by its
terms; as has been said, the Court will not make a new contract
for the parties—it may, indeed, set aside a contract for proper
cause, but it will not vary the terms of a contract entered into by
the parties.

The cases cited to us are not in point—they are actions to set

aside a contract as *ultra vires* or to compel the payment of the price inferred from an application for and allotment of stock, for declaring invalid the issue of stock as a gift, etc. No case has been found, and I am confident none can be found, in which the contract and the only contract upon which the stock was obtained was for a consideration valued by the parties, which consideration was fully paid, and the Court held the purchaser bound to pay anything more than or different from the consideration agreed upon.

The authorities are fully collected in Masten & Fraser's Company Law, 3rd ed., pp. 1083, 1084, and I do not cite them.

I would allow the appeal with costs here and below.

MASTEN, J.A.:—Supplementing only the statement of facts set forth in the reasons of the learned referee and of my brother Fisher, I quote in full the agreement on which largely turn the questions raised in this appeal. It appears at page 30 of the minute book, and reads as follows:—

“Memorandum of agreement made in duplicate this 14th day of June, 1921, between Dominion Development Corporation Limited (hereinafter called “the vendors”) of the first part, and Dominion Combing Mills Limited (hereinafter called “the purchasers”) of the second part.

“Witnesseth that for valuable consideration the parties hereto agree as follows:—

“1. The vendors agree to obtain a site of not less than two and one-half acres for the purpose of erecting the proposed plant of Dominion Combing Mills Limited and to transfer the same to the purchasers free from encumbrances.

“2. It is proposed that the said land shall consist of leasehold land obtained from the Toronto Harbour Commissioners, and the purchasers agree to assume and pay the rental of the said land as the same falls due.

“3. The vendors also agree to erect a factory building on the said land according to the plans and specifications hereto annexed as schedule A, or as may be approved by the company's directors, at a minimum cost of \$125,000, but which shall not exceed the cost of \$200,000.

“4. The vendors also agree to equip the said factory with machinery and equipment as set out in schedule B. hereto. The said machinery shall be properly installed in the said buildings at the cost of the vendors and to the satisfaction of the directors of the purchasers.

“5. The vendors agree to pay and discharge all liens, encumbrances, or other charges against the said buildings and the said

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 1930. duties and sales tax, prior to the date of the delivery of the said
 building fully equipped to the purchasers.

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 \$200,000 for working capital.

"7. In consideration of the above covenants, the purchasers
 Masten, J.A. agree to forthwith issue and allot to the vendors, or their nominees,
 10,000 fully paid-up and non-assessable preference shares of the
 par value of \$100 each, and 30,000 fully paid-up and non-assess-
 able common shares of the par value of \$50 each, being the total
 capital stock of the purchasers. The said shares shall be issued
 forthwith."

On the same date (the 14th June, 1921), a by-law was passed
 by the respondent company allotting and issuing to the appellant
 company all its shares, preferred and common, as fully paid-up.
 Thereafter the appellant company proceeded to fulfil the obliga-
 tions which it had undertaken by the agreement above recited. On
 the 7th January, 1924, by an agreement which appears at page
 92 of the minute-book, the respondent company acknowledged
 fulfilment by the appellant company of the foregoing agreement
 as varied by mutual consent, and released it from all claims save
 as to the payment of \$90,000 cash, which sum it is admitted was
 subsequently paid. Thus the original agreement of the 14th
 June, 1921, became completely executed.

The written statement of facts agreed between counsel con-
 tains, among others, the following paragraph:—
 Ledger A/C

No.

| | | |
|------------------------------|----------------|----------------|
| 201 Dominion Develop- | | |
| ment Corporation..... | \$200,000.00 | |
| 15 Buildings and equip- | | |
| ment | 337,290.00 | |
| 16 Machinery and equip- | | |
| ment | 612,440.02 | |
| 17 Furniture and fixtures... | 250.00 | |
| | | |
| | \$1,149,980.02 | |
| 21 Goodwill, etc. | 1,350,019.98 | |
| To capital stocks | | |
| 30 10,000 \$100 par pref- | | |
| erence shares | | \$1,000,000.00 |
| 31 30,000 \$50 par common | | |
| shares | | 1,500,000.00 |
| | | |
| | \$2,500,000.00 | \$2,500,000.00 |

"In the audits made by Messrs. Wilton C. Eddis & Sons for the year 1923 and also for the year 1924, the financial set-up is shewn as practically the same as above, the goodwill account being the same in both statements."

This entry is said to have been made by the auditor of the respondent company, but, so far as appears from the stated case, or from the evidence, is a pure bookkeeping entry devised by the auditor of the respondent company, never ratified by the board of directors of that company, and never notified to, much less approved by, the board of directors of the appellant company.

It might be sufficient for the disposition of this appeal to point out that the shares here in question were issued on the 14th June, 1921, as fully paid, in pursuance of the agreement of the same date, which agreement says nothing about goodwill as forming any part of the consideration; that the agreement was, in or prior to 1924, fully executed and cannot now be rescinded; that a real consideration for these paid-up shares has been given and accepted, which consideration was of uncertain value; that the contract is entire and single for the whole of the authorised shares of the appellant company, and, in my opinion, cannot be severed into parts, and that, according to the long established decisions both in England and in Canada, the Court will not inquire into the consideration or require proof that the consideration was equivalent in cash value to the nominal amount of the shares issued: *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, at p. 140; *In re Wragg Ltd.*, [1897] 1 Ch. 796; *In re Innes & Co. Ltd.*, [1903] 2 Ch. 254; *In re Hess Manufacturing Co.* (1894), 24 Can. S.C.R. 644; *Hood v. Caldwell* (1921), 50 O.L.R. 387, [1923] S.C.R. 488, 493; *Toronto Finance Corporation Ltd. and Cook v. Banking Service Corporation Ltd.*, 59 O.L.R. 278, 282. I refrain from quoting from these well known authorities save and except two observations. In *In re Wragg Ltd.*, Vaughan-Williams, J., observes at p. 816:—

"At all events, it seems to me that in a case where there is substantial property transferred and a price appears in the contract, and that contract has been acted on and the property parted with, where you cannot rescind the contract and restore the parties to their pre-contract position, you ought not to say that there was no consideration unless it is proved, and proved beyond all reasonable doubt, that the shares thus issued as fully paid were issued as a gift or a bonus to the vendors."

And at p. 817:—

"*Primâ facie*, I am not entitled to go behind the contract. The contract on the face of it is a perfectly unimpeachable contract, and it is for the official receiver to shew that he is entitled to go

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behind it before he can place any such reliance upon the absence of these people from the witness-box, and it seems to me under those circumstances that I ought not to draw the inference that I am invited to draw."

His views were confirmed by the Court of Appeal. At pp. 825 and 826, Lindley, L.J., says:—

"The real agreement was that the vendors should sell and that the company should buy the various properties mentioned in the schedule to the agreement for one sum of £46,300, which apparently was £11,000 more than could have been obtained from any other purchaser. But the parties did not appropriate any part of the purchase-money to any definite part of the property purchased, nor is the Court at liberty to do so. It would be wholly wrong to treat the agreement as one to pay £27,300 for stock-in-trade, valued as between the vendors and the company at £15,375, and to attribute the whole of the share capital to the purchase of that particular item. To do this is to fasten on the parties a contract which they never made and one, moreover, which would entirely defeat their intentions if the appellant is right in his contention."

It would have been more satisfactory if the evidence before us included the prospectuses and other documents filed by these companies in the department of the Provincial Secretary. The onus was on the liquidator of the respondent company of establishing liability on the part of a shareholder whose shares appeared on the register as fully paid. He has not chosen to put this evidence before the Court; and, in the absence of any evidence, it must be presumed that proper prospectuses were duly filed containing the information prescribed by the Act respecting the issue of the shares in question—for a consideration other than cash.

If I am right in this view, it does away with any imputation of fraud in the relationship of the directors to those members of the public who afterwards became shareholders. What I have just said is, in my opinion, a sufficient ground for allowing this appeal; but, as confusion seems to have arisen in some instances with respect to the application of the well established rules of law to differing sets of facts, I have thought that perhaps some further discussion of the points argued, arising on this appeal, may be of service.

The principles or rules relating to this branch of company law are succinctly stated in Buckley's Law and Practice under the Companies Acts, 10th ed., p. 207, and the exceptions to the rule established in *In re Wragg Ltd.* are noted. The passage to which I refer reads as follows:—

"Where shares are paid-up in kind, e.g. by a sale to the com-

pany of property, which the company has agreed to take as equivalent in value to the nominal amount of the shares, or by the rendering of services which the company has agreed to regard as of the same pecuniary value, the shares must be treated as fully paid-up (*Wragg Ltd.*, [1897] 1 Ch. 796, where the earlier cases are collected and discussed; *Innes & Co. Ltd.*, [1903] 2 Ch. 254), unless *either* the whole transaction can be impeached and the contract for payment in kind set aside (*Wragg Ltd.*, [1897] 1 Ch. 831), or it appears on the face of the contract that the value agreed upon is in fact less than the nominal amount of the shares (see the case put by Smith, L.J., in *Wragg Ltd.*, [1897] 1 Ch. 836; and *cf. Theatrical Trust, Chapman's Case*, [1895] 1 Ch. 771), or the alleged consideration is found to be non-existent or a mere blind (*Eddystone Marine Co.*, [1893] 3 Ch. 9, as explained in *Wragg Ltd.*, [1897] 1 Ch. 836; and see *Theatrical Trust, Chapman's Case*, [1895] 1 Ch. 771; *Alkaline Synd., Ames' Case*, [1896] W.N. 79; *Bury v. Famatina Development Corp.*, [1909] 1 Ch. 754, [1910] A.C. 439). The Court will not, save in the case above excepted, inquire into the consideration, or require proof that the consideration was equivalent in cash value to the nominal amount of the share (*Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, 140)."

These principles have been adopted and followed in our Courts: *In re Hess Manufacturing Co.*, 23 Can. S.C.R. 644; *Toronto Finance Corporation* case, 59 O.L.R. at p. 282; and *Hood v. Caldwell*, 50 O.L.R. 387, [1923] S.C.R. at p. 493.

I proceed to some examination of the decided cases, for the purpose of ascertaining whether the facts of this case bring it within any of the above exceptions to the general rule that the value received by the company is measured by the price at which the company agreed to buy the property it sought to acquire, and, whilst the transaction is unimpeached, that is the only value which the Court can take into consideration.

In this case, the whole transaction cannot be impeached and the contract for payment in kind set aside. That might have been possible while the contract remained executory, for a company cannot substitute an action for breach of contract for the statutory liability to pay calls: *Pellat's Case* (1867), L.R. 2 Ch. 527; but a different situation arose when the contract had become executed, on the one hand by the allotment and issue of the shares to the appellant company and sales of such shares by them, and on the other hand by the conveyance of a site and an equipped factory by the appellant to the respondent. The parties could not then be restored to their original position, and rescission was impossible. Not only so, but it is plain that rescission could not be had after

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S.C.R. 412, at p. 419.

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Then is this a case *where it appears on the face of the contract* that the value agreed upon for the property which the appellant transferred is in fact less than the nominal amount of the shares?

The cases of *In re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9, and *In re Almada and Tirito Co.*, 38 Ch.D. 415, afford examples of the circumstances under which this exception applies. In the former case, no consideration whatever was given. That which took place was a mere gift by the company of the shares in question, and that fact clearly appeared on the face of the documents evidencing the arrangement.

In the latter case the resolution under which the shares in question were issued read as follows:—

“That the capital of the company be increased from 210,000 shares of £1 each to 420,000 shares of £1 each, by the issue of 210,000 shares of £1 each credited with 18s. per share paid, with a deposit of 6d. per share.”

Thus, the £1 shares were issued as fully paid-up—while a part only was to be paid. They were issued at a discount and there was no consideration for the discount. In each case the infirmity affected the whole issue, was entirely without any consideration (other than the 2s. cash—in the latter case), and the facts appeared clearly on the face of the documents.

No such situation exists in the present case.

In the agreement of the 14th June, 1921 (quoted above), in pursuance of which the shares in question were on the same day allotted to the appellant company, no fixed monetary value is assigned on the face of the agreement to the cost of the site which was to be procured by the appellant company and conveyed to the respondent, nor to the value of the machinery and equipment which was to be installed by the appellant, and no reference is made anywhere in the agreement to an item of goodwill.

On the basis of that agreement, and for the consideration there set forth, all the shares of the Combing Mills Company were, on that day, allotted to the appellant company as fully paid shares, and the agreement was, on that date, fully performed by the respondent company. As already pointed out, the appellant company subsequently performed its part of the contract, and thereby the whole agreement of the 14th June, 1921, became completely executed by both parties.

It was not until after the agreement had become completely executed (save possibly as to the payment of the \$90,000 cash), that some auditor or accountant, presumably unacquainted with company law, made an entry in one of the books of the respondent

company, and which appears at p. 25 of exhibit 3, in which he credits the appellant company with "goodwill etc. \$1,350,019.98."

The directors of the respondent company do not appear to have had anything to do with this entry, nor does it appear to represent any action on the part of either company; but, even if the directors of the respondent company had presumed to pass the strongest resolution possible, supporting this entry, I am wholly unable to see how, behind the back of the appellant company, they could change or make without effect an executed contract or render shares which had been allotted and accepted as fully paid, for the considerations mentioned in the agreement, into shares partly paid, by inserting in their books a fictitious entry of the kind above described.

In the case of *In re Wragg Ltd.*, [1897] 1 Ch. at p. 836, Lord Justice A. L. Smith gives a clarifying illustration of the exception now under consideration, where he says:—

"Again, if in a registered contract a money value less than the face value of the share be placed upon the consideration which the company had agreed to accept as representing in money's worth the nominal value of the share, that share, I should think, would not be fully paid-up; for instance, as was put in argument, a contract to supply to a limited company 100 tons of coal, valued at 10s. per ton, as a consideration for 100 £1 shares in the company—i.e., a value of £50 worth of coal for 100 £1 shares—these shares would not be, I think, fully paid-up."

The judgment below appears to me to rest on the presumption that this appeal should be decided on the same footing as if the contract of the 14th June, 1921, had set a money value on each item of land, plant, and machinery which the appellant company was to supply—and had then specified goodwill as an asset to make up the amount by which these items fell short of the nominal par value of the shares allotted. Nothing of this sort appears in the agreement of the 14th June, 1921, and no such potency can be ascribed to a bare journal entry made by an auditor in the books of the respondent company without any concurrence on the part of the appellant company or the directors of the respondent company.

For this reason I am clearly of opinion that the transaction in question does not fall within the exception that "it appears on the face of the contract that the value agreed upon is in fact less than the nominal amount of the shares."

The next exception to be considered is: "In case the alleged consideration is found to be illusory, non-existent, or a mere blind." Whether, in the case of any particular issue of shares, the alleged consideration is illusory is, no doubt, a question of

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fact; but in the present case there can be no doubt but that furnishing the respondent with its lands, plant, equipment, and \$200,000 cash, is not an illusory, but a very real, consideration.

The reasons already pointed out for excluding the present case from the exception last discussed apply here also. The shares were issued in pursuance of an agreement which says nothing about goodwill. There was a real consideration given and accepted, which, at the time when the contract was executed, was of uncertain value, and, in order to find the appellant company liable as a contributory, it would be necessary that the Court should investigate and determine the cash value of the real estate, buildings and equipment, and the cash value of the machinery and equipment, and then, after dividing the contract into separate parts, find how much had been paid-up on certain shares selected by the Court for that purpose—thus making an entirely new contract for the parties.

Possibly because I was of counsel for the plaintiff, I have never been able to appreciate the ground on which the issue of shares in *Lindsay v. Imperial Steel and Wire Co.*, 21 O.L.R. 375, was severed into two parts. That decision is not binding on this Court; but, even if it were, the conclusion that one part of the issue was bad and one part good rests on the particular facts of that case and affords no guide to us here.

As I have already said, under the arrangement between the appellant and the respondent as made on the 14th June, 1921, it seems to me impossible to divide the shares received by the appellant into two portions—some fully paid and others wholly unpaid. I do not think that the appellant company would have been willing to enter into the arrangement at all unless it had been placed in full control of all the authorised shares of the respondent, and but for such a provision there would have been no arrangement at all. Whether that is so or not, the effect of the judgment below is to make for the parties an entirely new agreement, which the Court will not do.

For these reasons I concur with the other members of the Court in thinking that this appeal should be allowed with costs here and below.

I should add that the group of cases cited to us by counsel, including *Arnot's Case*, 36 Ch.D. 702, *In re Macdonald Sons & Co.*, [1894] 1 Ch. 89, *Ex p. Sandys*, 42 Ch.D. 98, *Re Pakenham Pork Packing Co.*, *Galloway's Case* (1906), 12 O.L.R. 100, and *McAskill v. Northwestern Trust Co.*, [1926] S.C.R. 412, have no application to the question arising on this appeal, and that such cases as *Hood v. Caldwell* and the *Toronto Finance Corporation* case, being actions antecedent to a winding-up order brought to

rescind the agreement, are wider in their scope than a proceeding by the liquidator to place a shareholder in the list of contributories. Consequently, the judicial opinions expressed in the former class of actions are to be applied with extreme caution in a proceeding like the present.

LATCHFORD, C.J., agreed with MASTEN, J.A.

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Masten, J.A.

ORDE, J.A.:—This appeal must in my opinion be allowed. The authorities relied upon to justify the placing of the development corporation upon the list of contributories in the winding-up of the combing company, as the holder of a large number of unpaid or partly paid shares, do not apply to the circumstances of this case.

This is not an action or proceeding to set aside or rescind the agreement between the two companies as fraudulent. Whether or not the agreement could have been set aside in a proper action upon the ground that the development corporation as the promoter of the combing company had given a grossly inadequate consideration in return for the issue to it, as fully paid-up, of all the shares of the combing company's stock, need not be discussed. That is not the issue, nor do principles invoked in determining such an issue apply to the present case at all.

The development corporation never subscribed for the combing company's stock in the ordinary way, that is, it never entered into any obligation or undertaking to pay for the shares it was to get according to their full par value in cash, or to be subject to calls thereon. Its sole obligation was to acquire a parcel of land, erect a factory building thereon, to equip the same with machinery, and to pay to the combing company \$200,000 in cash. In return for the performance of these things the combing company was to allot and issue to the development corporation 10,000 fully paid-up preference shares and 30,000 fully paid-up common shares having in all a par value of \$2,500,000.

The combing company having gone into liquidation under the Dominion Winding-up Act, the liquidator seeks to make the development corporation liable as a contributory for the difference between what is claimed to be the real value of the consideration for the issue of the shares and their par value. To give effect to this would be in the teeth of all the authorities. The liquidator cannot in the same breath ask the Court to declare the development corporation a holder of the shares by virtue of the agreement under which it acquired them, and at the same time repudiate the terms of that acquisition. That is, he cannot at the same time approbate and reprobate.

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As I have said, the authorities relied upon to support the liquidator's claim have no application here. The case of *Toronto Finance Corporation and Cook v. Banking Service Corporation*, 57 O.L.R. 514, 59 O.L.R. 278, [1928] A.C. 333, was an action for a declaration that a certain agreement between the plaintiff company and the defendant company was not binding, and it was held that the transaction was *ultra vires* of the plaintiff company, the shares having been issued at a discount.

Counsel for the liquidator referred to several cases where the issue of shares at a discount was involved. But in all such cases there was on the face of the transaction something to indicate that the shares were being issued for less than their cash par value. In one of the cases on which he relies, *In re Theatrical Trust Ltd., Chapman's Case*, [1895] 1 Ch. 771, Vaughan Williams, L.J., at p. 774, explains the distinction to which I have just referred. "Where one has to consider what is payment, it is plain that the moment the shareholder is relieved from the obligation of paying in cash, he may pay in goods, or in things without a physical existence, such as a goodwill or a licence. But the cases decide that a man must really pay for the shares, and further that if the contract makes it manifest on its face that the taker of shares is paying less than their nominal cash value, he may be liable for the balance. I do not think the cases go further than that. They do not say that the Court can take each contract and say whether the price given was fair and reasonable, or whether the thing given for the shares had a cash value in the market equal to the nominal value of the shares." That language is peculiarly applicable here.

The leading case to be applied here, is, I think, *In re Wragg Ltd.*, [1897] 1 Ch. 796, the head-note to which reads: "The value received by the company is measured by the price at which the company agreed to buy the property it sought to acquire; and whilst the transaction is unimpeached that is the only value which this Court can take into consideration."

The transaction has not been impeached otherwise than in these proceedings and the liquidator cannot impeach an instrument which embodied the transaction and at the same time seek to enforce it.

I agree that the appeal must be allowed and the Dominion Development Corporation's name removed from the list of contributories. The appellant should have his costs here and below.

Appeal allowed.

[APPELLATE DIVISION.]

ROGERS AND BROWN V. HAZELHURST.

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Jan. 17.

Vendor and Purchaser—Contract for Sale of Land—Time of Essence—Default in Payments by Purchaser—Specific Performance—Conditional Tender—Relief from Forfeiture.

By an agreement in writing, dated the 5th August, 1920, for the sale of land by the defendant to the plaintiff B. for \$2,000, partly payable in deferred instalments, it was provided that B. should pay taxes after that date and keep the buildings insured for not less than \$700, and should have possession until default. The agreement also provided that time was to be considered of its essence, and unless the instalments were punctually paid the defendant was to be at liberty to resell after three months' notice in writing to B. It was further agreed that the defendant should, "as the payments are made," if requested by B., "release parts of the said lands as may be sold by him, such parts not to exceed 40 feet of lake-front for each payment made." Fifteen instalments had been paid when, in December, 1927, B., asserting that he had sold a part of the land, with a lake-frontage of 600 feet, to the plaintiff R., claimed the operation of this clause. In April, 1927, the defendant complained that the payments were in arrear and that he (the defendant) had paid arrears of taxes "to redeem the property from sale." The amounts claimed were paid by B. in August, 1927; but the taxes of 1927 were paid by the defendant. A deed to R. of the part sold to him was tendered to the defendant for execution in December, 1927, but he refused to execute it. After some delay, B. sent the defendant a sufficient sum to cover his indebtedness, but the defendant refused to accept it, and also refused to accept an insurance policy sent. Finally, B.'s solicitors wrote to the defendant's solicitor enclosing a cheque for what was overdue and interest, and at the same time making the payment conditional upon the defendant executing the deed to R. The defendant refused to accept the cheque upon the condition, and this action was brought by R. and B., in effect for specific performance:—

Held (RIDDELL, J.A., dissenting), that the plaintiffs were entitled to be relieved from forfeiture and to a judgment for specific performance as to the 600 feet, upon payment within a specified time of any instalments due and taxes.

The defendant was not entitled to repudiate his agreement and at the same time to rely upon it by setting up that time was of the essence and that there was default.

Per RIDDELL, J.A.:—A conditional tender is ineffective if the condition is one which the tenderer has not the right to impose; and here the condition was a deed from the defendant to R., whereas all the defendant had agreed to do was to "release" the land to B.

AN appeal by the plaintiffs from the judgment of the County Court of the County of York (TYTLER, Jun. Co. C.J.) dismissing an action for specific performance of an agreement dated the 5th August, 1920, by the defendant for the sale and conveyance to the plaintiff Brown of 67 acres of land in the district of Muskoka. Rogers was joined as a party plaintiff because, in 1927, Brown, who was in possession of the 67 acres, and was not then in default, sold 600 feet of the land, fronting on a lake, to Rogers. There was

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a counterclaim, which the Judge at the trial permitted the defendant to withdraw.

October 23 and 24, 1929. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

J. H. Fraser, K.C., for the appellants, argued that specific performance of the agreement should be granted; that the plaintiff Brown was in no way in default at the time the defendant refused to grant the release of the 600 feet which had been sold to Rogers. The defendant could not repudiate his agreement and at the same time rely upon it: *Bark-Fong v. Cooper* (1913), 49 Can. S.C.R. 14.

R. S. Mills, for the defendant, respondent, contended that the exercise of the jurisdiction in equity as to enforcing specific performance is a matter for the Court's discretion, not a matter of right, and, in the circumstances of the present case, that remedy should not be granted: *Lamare v. Dixon* (1873), L.R. 6 H.L. 414, at p. 423. The tender made by Brown was ineffective, being conditional, and the condition being one which he had no right to impose: *Leake on Contracts*, 7th ed., p. 650, and cases there cited.

January 17. FISHER, J.A.:—Appeal by the plaintiffs from the judgment of his Honour Judge Tytler in an action for specific performance. The agreement upon which the action is grounded contains a clause providing that time is to be of the essence thereof, and the learned trial Judge, finding that the plaintiff Brown was in default, following *Steedman v. Drinkle*, [1916] 1 A.C. 275, *Brickles v. Snell*, [1916] 2 A.C. 599, and *Boericke v. Sinclair* (1928), 63 O.L.R. 237, dismissed the action.

The relief asked by the plaintiff Brown in his statement of claim is (a) "a declaration that the agreement in the pleadings mentioned is a valid and subsisting agreement," (b) specific performance of the same, and (c) an injunction.

The agreement between the plaintiff Brown and the defendant is dated the 5th August, 1920, for the sale and purchase of 67 acres in the district of Muskoka, for the sum of \$2,000; \$50 payable on the date of the agreement and the balance in instalments of \$50, payable on the 5th February and the 5th August in each year thereafter, without interest, until the whole principal is paid, but, if default is made in payment of any instalment, 6 per cent. is to be charged on all deferred instalments.

The agreement also provides that the purchaser "shall and will pay and discharge all taxes, rates, and assessments wherewith the said lands may be rated or charged, from and after the 5th August, 1920, and will keep the buildings on the said lands insured for not

less than \$700, with loss, if any, payable to the party of the first part (the defendant) as his interest may appear;" that the purchaser is entitled to a deed of the property "on payment of the said consideration of \$2,000 or upon payment of the sum of \$50 or any subsequent payment as provided above of \$50, and the execution by Brown of a mortgage for the balance;" that "time is to be considered the essence of this agreement, and unless the payments are punctually made at the time and in the manner above mentioned, the said party of the first part (the defendant) is to be at liberty to resell the said lands three months after giving notice in writing to the party of the second part of such intention;" and also that "it is further agreed by the party of the first part (the defendant) that as the payments are made he shall, if requested by the party of the second part, *release parts of the said lands as may be sold by him*, such parts not to exceed 40 feet of lake-front for each payment made."

The evidence is, that all the instalments were paid up to and including the 5th August, 1927, and also the taxes due for the year 1926.

In 1927 Brown sold to his co-plaintiff Rogers (that being the reason for his being joined as a party plaintiff) 600 feet of lake-frontage, and in December, 1927, as the defendant admits, Brown, who was not then in default, tendered to him for execution a conveyance to the plaintiff Rogers of the 600 feet of lake-frontage, and the defendant refused to execute the conveyance.

The defendant's reason for refusing is given at p. 64 of the evidence, line 8: "I refused to sign it on the advice of Mr. Johnston" (who was the plaintiff Rogers's solicitor), "because I could not see that if I released the land I would have any assurance that the rest of the money would be paid," and that, if he released the 600 feet of lake-front, "the whole balance including the 200 feet would be worth not more than \$150 or \$200."

The buildings on the property were insured in 1927 by Brown, with loss, if any, payable to the defendant as his interest might appear.

Brown refused to pay the instalment of \$50 which fell due on the 5th February, 1928, and the taxes for the year 1927. The defendant served him on the 3rd May, 1928, with a notice demanding immediate payment of the \$50 due on the 5th February, 1928, payment of arrears of taxes, and an insurance policy for \$700, and the notice provided that in default of payment of all principal and taxes, and the delivery of the insurance policy, the defendant on and after the 5th May, 1928, would take possession of the property for the purpose of resale.

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It appears that the defendant paid the taxes for 1927, amounting to \$44.85, and the defendant admits that some weeks after the 5th May, 1928, Brown sent a cheque payable to the defendant for that sum to the bank at Hanna, Alberta, to which place the defendant had gone to reside, and that the cheque was tendered to him and he refused it, and also that Brown sent to one Peterson, the defendant's solicitor, at Bruce Mines, a letter enclosing a cheque payable to the defendant for \$50.75, which included interest at 6 per cent. from the 5th February, 1928. According to the letter, this cheque was to be delivered on the condition that the defendant and his wife would agree to execute the deed to Rogers of the 600 feet of lake-frontage. The letter goes on to say: "If you will advise me that Mr. and Mrs. Hazelhurst will execute the deed of which tender was made, and thereby comply with the agreement which Mr. Hazelhurst signed, I will take your undertaking as sufficient, and will send the deed to you so that same may be executed. If, however, Mr. Hazelhurst refuses to execute the deed and will not put you in position where you can agree that they will execute the deed, then the condition of the delivery of the enclosed cheque to you is that you must return it to us, because we cannot put our client in the position where he cannot deliver to Mr. Rogers the property which he had sold to him, and at the same time overlook Mr. Hazelhurst's default and continue to make payments to him."

The defendant refused to accept the cheque on these conditions, and this action followed.

The agreement means that Brown is entitled to call for a deed of the whole of the property at any time after payment of the first or any subsequent instalment upon executing and delivering a mortgage in favour of the defendant, and that he was also entitled to call for a release—which word I interpret as meaning a deed—of 600 feet on the lake-front, to be executed by the defendant in favour of Rogers, and also to a deed to any other person to whom Brown might sell a 40-foot lake-front lot, if and when he made his \$50 instalment payments.

To give effect to the defendant's contention that he would, if bound to execute a deed to Rogers, not have sufficient value in the remainder of the property to secure him for the balance of the purchase-money, is to ignore the terms of the written contract, which, of course, he cannot do; that is a matter which the defendant should have considered before he executed the agreement. The defendant, by refusing, on the 27th December, to execute the deed to Rogers, clearly indicated to Brown that he did not intend to carry out that part of the agreement having reference to releasing

the lake-front property, and Brown was therefore, in my opinion, justified in withholding the instalment of the 5th February and payment of any taxes, due or to become due; and I also think Brown was entitled to infer from the reasons given by the defendant, and to which I have referred, that, if he paid any additional instalments and sold more of the lake-front property, the defendant would persist in refusing to execute a deed to any person to whom he made a sale. In these circumstances, I am of opinion that Brown was under no obligation to keep on paying the instalments and the taxes as they became due, or, in other words, to carry out his contract, in face of the defendant's positive refusal to carry out the contract on his part. As the matter now stands, the defendant has received from Brown on account of the purchase-money \$685. Rogers is and has been for a long time in possession of the 600 foot lake-frontage and has made improvements thereon, but is unable to obtain a deed, and Brown is in possession of the remainder of the property and under a legal obligation to procure a deed from the defendant to Rogers.

I can find no default by Brown, within the meaning of the agreement, in regard to either the payment of the instalments, the taxes, or insuring the property at the time the deed to Rogers was tendered to the defendant in December, 1927. All that Brown was required to do was to insure for \$700 with loss, if any, payable to the defendant, and this was done. There was no obligation to deliver the policy to the defendant, and there was no time stated when the taxes were to be paid.

My conclusion is that Brown had a good and valid reason for not making the payment due on the 5th February, and that, in tendering payment of the taxes and the cheque and requesting execution of the deed to Rogers, Brown made an honest attempt to carry out the terms of the contract, and that is all he was bound to do. The defendant cannot repudiate his agreement and at the same time rely on it, by setting up the defence of time being the essence and that there was default. In view of the defendant's wilful refusal to carry out the contract, I can see no relevancy in the cases relied on by the defendant, or in discussing the question of a conditional tender.

Brown has asked for specific performance in general terms, and that means in accordance with the agreement, and I agree with my brother Masten that the plaintiffs are entitled to relief from forfeiture and to judgment for specific performance as to the 600 feet frontage, upon payment within 30 days of any instalments due and taxes, and the rest of the contract will stand and be carried out according to its terms.

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The appeal should be allowed with costs here and below and the counterclaim dismissed with costs.

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LATCHFORD, C.J., agreed with FISHER, J.A.

Fisher, J.A.

MASTEN, J.A.—This was an appeal by the plaintiff from the judgment of the County Court of the County of York, dated the 13th March, dismissing an action for specific performance of a contract for the sale of land in the district of Muskoka.

Particulars of the facts and agreements upon which this action turns appear in the judgments of my brothers Riddell and Fisher, and I do not repeat them.

I think the term “release” referred to in the agreement in question means a deed conveying the land to be released; and when the defendant Hazelhurst wrongfully refused to execute any document releasing the 600 feet which had been sold to Rogers, the equitable title in that 600 feet passed to the plaintiff Brown free and clear of any claim thereon by Hazelhurst. No man can take advantage of his own wrong. On this ground I think that specific performance should be granted so far as it relates to that part of the lands sold by Brown to Rogers.

With respect to the remainder of the property, I think, in view of the defendant’s wrongful refusal to release the 600 feet above mentioned, there should be relief from any alleged forfeiture, and that, on payment within 30 days of all sums now due under the agreement, the appeal should be allowed, and the defendant’s counterclaim should be dismissed, with costs of claim and counterclaim here and below.

ORDE, J.A., agreed with MASTEN, J.A.

RIDDELL, J.A.:—An appeal is taken by the plaintiffs from the judgment of the County Court in this action, tried before his Honour Judge Tytler without a jury. The defendant, being the owner of certain land in Muskoka, on the 5th August, 1920, entered into a written agreement with the plaintiff Brown for its sale for \$2,000, payable \$50 down and \$50 on the 5th February and 5th August in each year, without interest, until the full purchase-price should be paid—the purchaser having the right to discount any of the payments at 6 per cent., compound interest—all overdue instalments to bear interest at 6 per cent. The purchaser was to pay taxes, etc., after the 5th August, 1920, and to keep the buildings insured for not less than \$700, and was to have possession until default.

A provision of importance and much relied upon by the defendant reads:—

"And it is expressly understood that time is to be considered the essence of this agreement, and, unless the payments are punctually made at the time and in the manner above mentioned, the said party of the first part is to be at liberty to resell the said land, three months after having given notice in writing to the party of the second part of such intention."

The property is chiefly valuable from fronting on the lake (a frontage of about 1,600 feet); and the following clause was inserted in the agreement:—

"And it is further agreed by the party of the first part that as the payments are made he shall, if requested by the party of the second part, release parts of the said lands as may be sold by him, such parts not to exceed 40 feet of lake-front for each payment made."

Fifteen instalments had been paid when, in December, 1927, the plaintiff Brown, asserting that he had sold a part of the land, about 25 acres, with a lake-frontage of 600 feet, to the plaintiff Rogers for \$625, claimed the operation of this clause. He, however, had been neglecting to pay the taxes: in the previous April, the defendant's solicitor wrote complaining of his defaults as follows:—

"You are aware that you are in arrears in your payments for the above property for over two years; also for \$92.45 arrears of taxes paid by Mr. Hazelhurst in November, 1925, to redeem the property from sale. Unless all arrears with interest thereon is paid Mr. Hazelhurst will terminate the agreement and resell the property. It seems useless to wait longer."

These amounts were paid by the plaintiff Brown on or about the 5th August, 1927, which included the taxes of 1926; but the taxes of 1927, amounting to \$44.80, were unpaid and these were paid by the defendant.

A deed was tendered to the defendant in December, 1927, after the sale to Rogers; and the defendant refused to execute the deed, which purported to convey some 600 feet frontage to Rogers. There was at that time no default, so far as appears. The instalment due on the 5th February, 1928, was not paid; and, in May, the plaintiff Brown was served with a notice dated the 24th April: this (1) demanded immediate payment of all arrears under the original agreement, "there now being a payment of \$50 in arrears since the 5th day of February, 1928:" (2) demanded payment of arrears of taxes, "there being arrears of taxes unpaid at the present time;" (3) demanded an insurance policy of \$700 "under the covenant . . . in said agreement . . . you having neglected at the present time to furnish me with an insurance policy pur-

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Riddell, J.A. suant to the said covenant;" and (4) gave notice that, in default of payment of all principal and taxes and the delivery of an insurance policy as provided by the covenant, on or before the 5th May next, "I shall, on or after the 5th day of May, 1928, proceed to take possession of the property mentioned in the aforesaid agreement, and to resell, release, or turn over said property as I may deem wise and best in order to recover the balance due me under said agreement, and also to cancel said agreement, and you will in such event forfeit any payments made heretofore on account of said property, all of which said payments shall be treated as occupational rental, I having suffered damages and inconveniences by reason of your non-fulfilment of your part of the agreement."

Instead of at once paying what he should, that is, the February, 1928, instalment with interest, and the taxes due in December, 1927, Brown waited till the end of May before offering to pay the taxes, only to find them already paid by the defendant—he then sent to a bank, near the defendant's residence in Alberta, sufficient to reimburse the defendant with interest. The defendant refused to accept the money; and also refused to accept the insurance policy sent with the draft. No subsequent tender has been made.

In the meantime, Brown's solicitors wrote to the defendant's solicitor, enclosing a cheque for the \$50 overdue and interest, with the condition:—

"This cheque is sent to you to cover this payment on the condition that Alexander William Hazelhurst and his wife agree to execute a conveyance to one Henry Launder Rogers of 600 feet of the property as described in a certain indenture of deed tendered to Hazelhurst for execution on or about the 10th day of December, 1927, which deed Hazelhurst, in breach of his agreement, refused to execute at the time of the said tender.

"If you will advise me that Mr. and Mrs. Hazelhurst will execute the deed of which tender was made, and thereby comply with the agreement which Mr. Hazelhurst signed, I will take your undertaking as sufficient and will send the deed to you so that the same can be executed. If, however, Mr. Hazelhurst refuses to execute the deed and will not put you in position where you can agree that they will execute the deed, then the condition of the delivery of the enclosed cheque to you is that you must return it to us because we cannot put our client in the position where he cannot deliver to Mr. Rogers the property which he has sold to him and at the same time overlook Mr. Hazelhurst's default and continue to make payments to him."

The letter mentioned the service of the notice of cancellation already referred to; and disputed the right of the defendant either

to re-enter or to sell; it notified the solicitor that the insurance had been effected, and added:—

“The matter of the taxes will be attended to as soon as your client puts us in the position to know where we stand with Rogers.”

This tender was conditional; and it is clear law that such a tender is ineffective, if the condition is one which the tenderer has not the right to impose: Leake on Contracts, 7th ed., p. 650, citing *Foord v. Noll* (1842), 12 L.J.C.P. 2, 2 Dowl. N.S. 617; *In re Steam Stoker Co.* (1875), 44 L.J. Ch. 386, L.R. 19 Eq. 416.

The condition sought to be imposed was a deed from the defendant to Rogers, whereas all he had agreed to do was to “release” the land to the plaintiff Brown: *Stocker v. Wedderburn* (1857), 3 K. & J. 393. We need not consider whether it is our law, as it is held in some of the United States, that a tender is not invalid because it is coupled with a demand for the performance of a reciprocal duty enjoined by law upon the person to whom the tender is made: *Johnson v. Cranage* (1880), 45 Mich. 14; *Halpin v. Phoenix Insurance Co.* (1890), 118 N.Y. 165.

I can find nothing in the subsequent proceedings to alter the situation in the plaintiff’s favour—his conduct was irritating and dilatory; and the defendant was forced to perform a duty which the plaintiff had undertaken. I agree with the County Court Judge that no case is made out for specific performance.

I understand the learned County Court Judge to permit the defendant to withdraw his counterclaim; and that is proper. The defendant will be well advised to consider with care precisely what rights he has under the agreement; we should not direct the cancellation of the agreement; but we should allow the parties to work out their respective rights as best they may. I may be permitted to add that this is another instance of want of proper care in expressing the terms of a written contract.

I would dismiss the appeal with costs.

If the parties have even a modicum of common sense they will settle this case and not invite further litigation.

Appeal allowed (RIDDELL, J.A., dissenting).

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[APPELLATE DIVISION.]

1929.

GREEN V. FRASER.

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Jan. 20.

Trusts and Trustees—Trustee under Syndicate Pooling Agreement relating to Mining Claims—Sale at Less than Minimum Price Stated in Agreement—Construction of Agreement—Approval of Majority of Syndicate—Protest of Minority—Whether Trustee Guilty of Breach of Trust—Advice of Solicitor.

Several owners of different mining claims dealt with them by an agreement, dated the 15th August, 1925, reciting that the parties thereto had agreed each with the others that all the claims should be pooled and each should have an interest in the pool equal to the proportion which his individual claim bore to the total. The claims were all to be conveyed to the defendant for the purposes of sale, and he was given full power to deal with the claims subject to the conditions set forth. The claims might be sold together or separately; if sold separately each party should receive his proportion of the sale-price irrespective of in whose name the claim stood before the agreement. The defendant was given full power to deal with the claims as if they were his own absolute property, subject to obtaining a price of \$150,000 for all or \$13,637 per claim. Should this minimum price not be obtained, the majority of interests might agree to selling for a lesser sum, and the other interests should be bound by such agreement. Should the claims not be sold or optioned in a year from the date of the agreement, the majority of interests might then decide as to what further action should be taken in connection with the claims, and the defendant should then deal with the claims as the majority of interests should agree, and any question in connection with the claims should be decided by the majority of interests. Provision was made for the calling of meetings to determine any question that might arise.

The claims were not sold but were optioned within the year at \$150,000. The holders of the option spent much money in developing the claims, but found little ore. They said, early in 1929, that they would abandon all money paid and all money spent upon the claims, unless easier terms could be obtained, and they offered shares in their incorporated company and some cash. A meeting was called, and the majority, that is, all but the two plaintiffs, agreed to accept the offer. The defendant was advised by his solicitor that it was his duty to obey the instructions of the majority, and he conveyed the claims to the company, the consideration being \$3,000 cash and 135,000 shares. In an action to recover the plaintiffs' shares of the cash unpaid on the option:—

Held (HODGINS, J.A., dissenting), that the defendant was not guilty of a breach of trust; and the action was dismissed.

AN action by W. T. Green and W. H. Riddell against F. C. Fraser to recover from the latter, as trustee, \$9,212.40, under an agreement dated the 25th August, 1925.

The action was tried before FISHER, J.A., without a jury, at Sudbury.

J. J. O'Connor, for the plaintiffs.

G. M. Miller, for the defendant.

September 16, 1929. FISHER, J.A.:—The material facts, which are not in dispute, appear to be that the plaintiffs and several others were desirous of pooling their interests in certain mining claims owned by them in the district of Sudbury, and on the 25th August, 1925, they entered into an agreement, whereby the defendant, who was also one of the owners, was named as and accepted the office of trustee for all of the parties interested, including himself.

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The agreement provides that "the said F. C. Fraser" (the defendant trustee) "shall have full power to sell, option, and deal with the said claims in the same manner as if they were his own absolute property, subject to obtaining therefor a minimum price of not less than \$150,000, including the commission, and subject to accounting to each of the parties hereto of their proportion of such moneys as may be obtained for the sale of the said claims or any part thereof.

"Should the minimum price not be obtainable by the said F. C. Fraser, the majority of the interests may agree to selling for a lesser amount, and the other interests shall be bound by such an agreement.

"Should the claims not be sold or optioned within one year from the date hereof, the majority of interests may then decide as to what further action shall be taken in connection with the said claims, and the said F. C. Fraser shall then deal with the said claims as the majority of interests shall agree upon.

"Any question that may arise in connection with the said claims shall be decided by the majority of interests, and any meetings required to be called for considering any such questions are properly called on 5 days' notice given by the said F. C. Fraser to the others by registered mail to the addresses herein given."

The defendant, on the 15th February, 1926, gave to one Goldsborough and his assigns an option to purchase, on the terms therein mentioned, the mining properties for the sum of \$150,000, and this option was assigned to the McMillan Gold Mining Company Ltd. Paragraph 4 of the statement of defence reads:—

"The said McMillan Gold Mining Company Ltd. proceeded at once to develop the properties under options, and spent over \$200,000 in the development of the same and proved the properties to be valuable mining properties."

On the 8th November, 1928, all the parties agreed to extend the time and to accept certain shares of the McMillan company in satisfaction of what was then due or to become due under the option assigned to the McMillan company. In February, 1929, the McMillan company notified the defendant that they were not

Fisher, J.A. prepared to spend any more money in the development of the properties, and submitted a new offer under the terms of which they were prepared to pay, in addition to what they had already paid, \$3,000 in cash, and to transfer 135,000 shares of the stock of their company of the par value of \$1 per share for the said properties. All the parties, excepting the plaintiffs, agreed to accept this offer, and the defendant, pursuant to the terms of the agreement of the 25th August, called a meeting—giving to all parties 5 days' written notice—for the purpose of discussing and deciding upon the acceptance or rejection of the McMillan offer, and at that meeting all the parties—excepting the plaintiffs, who again protested—passed a resolution authorising the defendant as trustee to accept the offer and to transfer the properties.

The defendant, as authorised by agreement dated the 11th February, 1929, sold and transferred the properties to the McMillan company and received the \$3,000 in cash and the 135,000 shares referred to, and the properties are now vested in the McMillan company. This agreement was executed by all the parties interested other than the plaintiffs, and para. 3 reads:—

“It is agreed that this agreement does not supersede but is in addition to the agreement of the 15th August, 1925.”

The plaintiffs, in para. 14 of their statement of claim, alleged, and at the trial the defendant did not dispute, but on the contrary admitted, that by a statement made up by the defendant and furnished to the plaintiffs on the 12th March, 1929, there was due to each of the plaintiffs, before the new offer was accepted, up to the 11th February, 1929, a sum of \$4,956.20, and this action is brought to recover these sums. This statement is not put in, and the Court has no information as to how it was made up or when the money was to be paid.

For the defendant it is contended that, before completing the sale—being in doubt as to his legal position—he took counsel's advice and was assured that, according to the true construction of the agreement of the 25th August, and especially that part thereof that says “any question that may arise in connection with the claims,” he was, if and when authorised by the majority of those interested, entitled to sell, and, by following that advice and complying with the authority of a majority of those interested, under no liability to the plaintiffs; that he acted honestly and in the best interest of all, including the plaintiffs; that from the best information obtainable it was doubtful, if the McMillan company's new offer was not accepted, whether they would abandon the property, and the plaintiffs and others interested would lose everything; that, if the plaintiffs were held entitled to succeed

in this action, and the McMillan company subsequently abandoned the property, the plaintiffs would receive the amounts now claimed and the other members of the pool receive nothing; and that, in any event, if there was a breach of trust, it was a technical one, and the defendant is entitled to be relieved from personal liability under sec. 34 of the Trustee Act, R.S.O. 1927, ch. 150, which reads:—

“If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which he committed such breach, the court may relieve the trustee either wholly or partly from personal liability for the same.”

So far as this section is concerned, I find as a fact that the defendant acted honestly in this transaction, and therefore I should like to hold that he should be given relief from personal liability; but the difficulty I have is in finding that in all the circumstances he acted reasonably as required by the Act, because he knew before the meeting was called, and at the meeting, that the plaintiffs were protesting against his acceptance of the McMillan offer and refused to give their consent, and, instead of applying to the Court for advice and directions, he preferred to act on the advice of his solicitor and the authority of a majority of those interested. It would, I think, be establishing a dangerous precedent to hold that a trustee was entitled under this section to be relieved from personal liability simply because he took the matter up with, and was governed by, his legal adviser and by a majority of those interested in a trust property, as, no matter how careful and skilful a counsel may be in the advice given to a client, he may, nevertheless, be mistaken, and the consent of the majority of those interested may have been given or obtained for selfish reasons to the detriment or loss of the minority.

In my opinion, the defendant trustee should, when confronted with the objections by a minority of those interested and the provisions of the agreement under which he accepted the trust, not have sold to the McMillan company, but have taken advantage of the Act, passed expressly for the purpose of protecting him when in doubt; and, having failed to do so, cannot be held to have acted reasonably within the meaning of this section of the Act. In such circumstances, the trustee's plain duty was either to refrain from

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1929. *Whicher v. National Trust Co.* (1910), 22 O.L.R. 460, and *National Trustees Co. of Australasia v. General Finance Co. of Australasia*,
GREEN [1905] A.C. 373. I must, therefore, hold that this contention fails.
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In referring to the agreement itself, it is, I think, clear that, a sale with the consent and approval of all the interested parties having been made within a year from the date of the agreement—the 25th August, 1925—for the minimum price of \$150,000, the defendant was not thereafter entitled to cancel or alter that agreement or to make a sale for a lesser sum without the consent of all the parties interested. In my opinion, the agreement means that, if the minimum price of \$150,000 was not secured within a year, the trustee was in that event entitled to sell, upon obtaining the consent of a majority of the interested parties, and not otherwise.

The contention that the words “any question that may arise in connection with the said claims” shall be decided at a meeting to be called by the trustee, on 5 days’ notice, by the majority of interests, must also fail, as, in my opinion, that part of the agreement has no relation to or bearing upon the right of the trustee to make a sale at a price less than the minimum, but refers to the majority a right to determine any other questions or claims that may arise in connection with the administration by the defendant of the trust property. The fact that because the trustee and the majority thought that they were, in accepting the lesser sum, acting in the best interests of the plaintiffs and themselves, is no answer to the violation of an express and important term of the agreement. It may also be quite true that, if the plaintiffs succeed in this action and the McMillan company thereafter abandon or refuse to go on and develop the property, the plaintiffs will, upon payment of the amount now claimed, obtain an advantage over the other members of the said syndicate; but, again, I cannot see in what way that is an answer to the breach of trust, because it may turn out that the properties are of great value, as is admitted by the defendant in para. 4 of his statement of defence, and, if so, the plaintiffs would be the losers by the defendant’s conduct in accepting less than the minimum price. There is no evidence, as contended by counsel for the defendant, that the mining claims owned by the plaintiffs have been found worthless as mining properties; but, even if that were an admitted fact, it would not affect the plaintiffs’ right to recover, as the August agreement provides that “all the mining claims shall be pooled and each shall have an interest in the pool equal to the proportions which his interest in the individual claims bears to the total.”

For the reasons given, and in view of the admission made by

counsel for the defendant at the trial, that, if the defendant was held to be liable, the plaintiffs were each entitled to \$4,956.20, there will be judgment for the plaintiffs for \$9,912.40 and costs if demanded.

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The defendant appealed from the judgment of FISHER, J.A.

December 9 and 10, 1929. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

T. N. Phelan, K.C., for the appellant. The learned trial Judge erred in finding that the trustee, having once sold the property, had no further right to deal with it in the way of reselling it or granting another option, but that his power was limited to dealing with questions other than these. The trust agreement contemplates only one thing—the selling or optioning of the claims. There was no mention or thought of working the claims otherwise, and therefore the power was properly exercised. The trustee, in acting upon the authority of the majority of the interests, was acting within the true meaning of the trust agreement. This agreement was not practicable unless all the properties were thrown into and dealt with together in bulk. The circumstances of the parties and the objects of the agreement must be looked at. The clause in question was put in for the express purpose of meeting the contingency which might and actually did arise in connection with the sale or option, i.e., the substitution of shares for cash. If this contention is not upheld, under secs. 32 and 34 of the Trustee Act, R.S.O. 1927, ch. 150, the trustee ought to be relieved. The learned trial Judge erred on the test of reasonableness in finding that acting against the wish of the minority was unreasonable. The proper test is whether he acted as a reasonably prudent man would have acted: *Re Collins* (1927), 61 O.L.R. 225. When the defendant put his own property into the deal, he was acting according to the test laid down. In view of the fact that he acted on the advice of counsel, it cannot be said that in not applying to the Court for directions he acted unreasonably: *Davis v. Nelson* (1927), 61 O.L.R. 457. The plaintiffs have entirely misconceived their remedy. If it is held that the majority had no power to make the subsequent agreement, then the trustee's power and the agreement are at an end. The plaintiffs' only remedy is to sue for the recovery of their interest in the claims. It is not proper to ask the defendant to put up money which he never got and could not get, or to guarantee the carrying out of the option over which he had no power or control. If the assessment of damages is on a wrong basis, there is no evidence of any proper

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basis, and for that reason alone the action should be dismissed. The defendant is the trustee not for the two plaintiffs but for the whole group, and the action should have been brought against the group.

R. S. Robertson, K.C., for the plaintiffs, respondents. The words in the trust agreement "power to sell" mean for money only: *Lewin on Trusts*, 13th ed., p. 1064, para. 16; *Williams on Vendor and Purchaser*, 2nd ed., p. 266. The wording of the clause in question gives the trustee specific power to sell or option for a specific price and for money, which in itself excludes power to deal with the property in any other way. The later words "power to deal with any question arising in connection with the claims" does not widen the earlier specific powers. General words following specific words must be limited to the purposes of the earlier specific words: *Blackburne v. Flavelle* (1881), 6 App. Cas. 628, at pp. 634-5; *In re German Date Coffee Co.* (1882), 20 Ch. D. 169, at p. 188; *Margetson v. Glyn*, [1892] 1 Q.B. 337, at p. 344. What was done here was outside the specific power of the trustee which the majority of the owners had no power to enlarge. The original option had not come to an end when the second option purported to have been given. What was done was merely to substitute shares for the cash payments under the original option. The optionee never intended to let the option drop, and was very careful that it should not again get on the market. The oral statement by the optionee that no more money would be paid did not terminate the option. Therefore the situation was not one where a new option could have been given. In order that the trustee be excused under the Trustee Act, the defendant must shew that he acted honestly and reasonably and that on his whole conduct he is entitled to have the benefit of the section extended to him: *Lewin on Trusts*, 13th ed., p. 949; *Re Nichols* (1913), 29 O.L.R. 206. The breach committed must be something of the character which the trustee is empowered to do. Here he was acting with no power whatever, and is not entitled to the benefit of the section: *Whicher v. National Trust Co.*, 22 O.L.R. 460; *In re Windsor Steam Coal Co. (1901) Limited*, [1929] 1 Ch. 151, at p. 161. What excuse has the trustee for not applying to the Court for directions? The question was raised here in the most emphatic form. It was not reasonable for him to proceed without the direction of the Court when he knew that strenuous objections to his authority were being made, particularly in view of the loose evidence given as to the solicitor's opinion: *In re Turner*, [1897] 1 Ch. 536; *In re Stuart*, [1897] 2 Ch. 583; *In re Brookes*, [1914] 1 Ch. 558. The award of damages was on the correct

basis. No particular claims now belong to the plaintiffs. Their interests merged into one. That is so even if the purpose of the trust fails. They cannot have their individual claims back. The trustee is chargeable with the minimum price at which he is authorised to sell, in the absence of evidence that he could not get the sale-price after he had reported the property sold. There is no evidence that the property was not worth the price for which it was sold.

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January 20. MULOCK, C.J.O.:—This is an appeal from Fisher, J.A., who held the defendant liable in damages for a breach of trust. Briefly the facts are as follows:—

The plaintiffs and others owned, respectively, mining claims in the district of Sudbury, and by a deed of trust dated the 15th day of August, 1925, transferred their respective claims to the defendant in trust to sell the same, and, in the event of selling, to account to each party for his proper share of the purchase-money.

The plaintiffs allege that, according to the terms of the trust deed, the defendant was not entitled to sell the shares for less than \$150,000, but that, in breach of his duty, he sold the same for a smaller sum, namely, \$3,000 cash and 135,000 shares of the par value of \$1 per share in the McMillan Gold Mines Limited. The sole question is whether the defendant was entitled under the trust deed to have so sold the shares. The trusts are in the following words:—

“The said F. C. Fraser shall have full power to sell, option, and deal with the said claims in the same manner as if they were his own absolute property, subject to obtaining therefor a minimum price of not less than \$150,000, including commission, and subject to accounting to each of the parties hereto of their proportion of such moneys as may be obtained for the sale of the said claims or any part thereof.

“Should the minimum price not be obtainable by the said F. C. Fraser, the majority of the interests may agree to selling for a lesser amount, and the other interests shall be bound by such an agreement.

“Should the said claims not be sold or optioned within one year from the date hereof, the majority of interests may then decide as to what further action shall be taken in connection with the said claims, and the said F. C. Fraser shall then deal with the said claims as the majority of interests shall agree upon.

“Any question that may arise in connection with the said claims shall be decided by the majority of interests, and any meetings required to be called for considering any such questions are pro-

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perly called on five days' notice given by the said F. C. Fraser to the others, by registered mail to the addresses herein given."

By agreement dated the 15th day of February, 1926, the defendant granted an option to purchase the said shares for \$150,000 to one Charles Goldsborough. Goldsborough assigned his option to Patterson, who assigned it to the McMillan Gold Mines Limited, and during the life of the option the optionees expended in testing the property between \$200,000 and \$250,000.

Then the McMillan Gold Mines Limited notified the defendant that they would not exercise the option. Thereupon the defendant went to New York and negotiated with the company for a purchase of the property, the consideration to be \$3,000 in cash and the said 135,000 shares in the company. The defendant called a meeting of all the parties who had conveyed to him their shares, and submitted to them the terms of the proposed sale, and all of them except the plaintiffs agreed thereto, and thereupon the defendant conveyed the property to the McMillan Gold Mines Limited, the consideration being \$3,000 cash and 135,000 shares.

No attack is made upon the defendant because of any inadequacy of price realised from such sale, the sole complaint being that according to the trust deed the defendant was not entitled to sell the property for less than \$150,000. This sum he did not realise, but the trust deed, in my opinion, entitles him, with the consent of the majority of the interest, to sell for a lesser sum. It says: "Should the minimum price not be obtainable by the said F. C. Fraser, the majority of the interests may agree to selling for a lesser amount, and the other interests shall be bound by such an agreement." The majority of the interests did agree to the sale in question. It is true that part of the consideration is in shares. If they are of no value, then the consideration was \$3,000. The trustee, I think, was entitled to sell for \$3,000 if the majority approved of his so doing. The mere circumstance that he got something in addition to money does not, I think, invalidate the sale.

I, therefore, am of opinion that the defendant was not guilty of a breach of trust in the sale which he made of the property, and therefore this appeal should be allowed with costs and the action dismissed with costs.

If, however, another view should prevail, then I would point out that there is no evidence to support the amount of damages awarded to the plaintiffs, and the judgment should be amended by directing a reference to determine the amounts.

MAGEE, J.A.:—I agree with the reasons and conclusion of my Lord the Chief Justice. App. Div.

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It may be conceded that neither as co-owners nor as partners, if that relationship had existed, could the transaction entered into have been forced upon the minority by the majority, and that its propriety depends wholly upon the terms of the agreement of the 15th August, 1925. By it the eleven mining claims were to be transferred to the defendant as trustee "for the purpose of sale and dealing with" and he was to "have full power to sell, option, and deal with" them "as if they were his own absolute property, subject to obtaining therefor a minimum price of not less than \$150,000," and, if sold separately, he was to obtain a minimum price of not less than \$13,637 per claim. This was followed by the clause providing that, should the minimum price not be obtainable, the majority of the interests might agree to selling for a less amount, and the other interests would be bound. These undoubtedly point to a sale and only a sale. But the agreement recited that the defendant was to have full power to "deal with" the claims subject to the conditions thereafter mentioned. One of those "conditions" was the provision that, should the claims not be sold or optioned within a year, the majority of interests might then decide as to what further action should be taken in connection with the claims, and the defendant should then "deal with" them as the majority of interests should agree upon. In this case that provision, in my opinion, took effect. It is true the properties had been "optioned" within a year, but it is, I think, manifest that that meant that the majority could not so direct the dealing while a proper option granted within the year was in force—nor until after the year expired—but, if an option for say 30 days had been granted during the last 10 days of the year and had expired without the option being exercised, that clause would take effect—and was intended to take effect. If on the 25th day the holder of the option announced that he could not carry out the purchase, and both sides agreed that the option was at an end, that surely is the same as if the 30 days had expired.

That clause in the agreement was followed by the provision that "any question that may arise in connection with the said claims shall be decided by the majority of interests," which was in my view intended and operates as an omnibus clause to cover whatever was not governed by special provisions.

Here the holders of the option did announce that they could not and would not exercise it. The majority and the trustee were as free to "deal with" the same holders as with strangers, and they did deal with them, the old option being done away with by con-

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sent. Incidentally, I think, the majority could consent to the cancellation, that is the relinquishment, of any mere option. Then the new sale for shares in the same company does not affect its validity any more than if it were for shares in a chartered bank or any other saleable commodity. It was in effect for shares in mining claims, though subject to a majority, and was, it seems to me, well within the purview of the pooling scheme entered into by the plaintiffs.

Beside all that, it must be remembered that the plaintiffs could, if their contention is right, have prevented the sale by notifying the purchasers that the trustee had no power to sell—or by applying for an injunction. It does not appear whether the conveyance to the defendant described him as trustee or not, or otherwise gave notice of the trust, but a notice or a *lis pendens* or an injunction was available to the plaintiffs. They chose to lie by and bring this action, in which there is no attempt to prove that there is any loss to them, and in my view they not only have proved no loss, but have, in a Court of Equity, where alone they could succeed, precluded themselves from relief.

HODGINS, J.A.:— Appeal from the judgment of Fisher, J.A., whereby he directed judgment to be entered in favour of each plaintiff for the sum of \$4,956.20, together with costs. The facts are substantially set forth in the reasons for judgment of the learned trial Judge. The questions argued turned upon the provisions of an agreement to which the plaintiffs and defendant, with others, were parties, dated the 15th day of August, 1925. It is sufficient to say that by that agreement nine parties, including the plaintiffs and defendant, who owned between them a total of fourteen mining claims, agreed that these should be pooled, and that each party should have an interest in the pool equal to the proportion which his interest in the individual claim bore to the total. It was also agreed (and this agreement was carried out) to transfer to the defendant all the claims “for the purpose of sale, and that he shall have full power to deal with the said claims, subject to the conditions” set out in the agreement. The parties further covenanted and agreed, each with the other, that they would transfer their interests to the defendant as trustee “for the purpose of sale and dealing with the said claims.” The material conditions which are mentioned in the agreement may be summarised as follows: (1) The defendant as trustee was given full power “to sell, option, and deal with the said claims in the same manner as if they were his own absolute property, subject to obtaining therefor a minimum price of

not less than \$150,000, including commission, and subject to accounting to each of the parties for their proportion of such moneys as might be obtained for the sale of the said claims or any part thereof." (2) The claims were to be considered as a whole, and each party as entitled to "that proportion of the sale-price of any or all of the claims which his interest in the individual claims bears to the total amount," the sale-price to be divided in accordance with their interest in the whole claim. (3) In any option given, a chartered bank was to be designated into which payments by the optionee were to be made, and provision made for the payment out to the parties of their shares of it from time to time. (4) Should the minimum price not be obtainable, the majority of the interests may agree to sell for a lesser amount, "and the other interests shall be bound by such an agreement." (5) "Should the said claims not be sold or optioned within one year from the date hereof, the majority of interests may then decide as to what further action shall be taken in connection with the said claims, and the said F. C. Fraser shall then deal with the said claims as the majority of interests shall agree upon." (6) "Any question that may arise in connection with the said claims shall be decided by the majority of interests." Provision for proper notice is added.

Pursuant thereto, the defendant gave an option to one Goldsborough on the 15th February, 1926, the provisions of which enabled the optionee (so-called) to enter upon the property and take possession of it, with the right during the currency of the option to carry on mining operations and do and record the necessary work, etc.; and, in the event of any ore being shipped, the profits were to be divided between the defendant (called optionor) and the optionee in certain proportions.

It is unnecessary to recite the other provisions of the option, except to say that it required payment of the sum of \$165,000 in certain amounts, beginning with a payment on the 1st April, 1926, and ending with one on the 1st June, 1928. It was further stipulated that a transfer of the mining claims should at once be deposited with the bank to be held in escrow until the completion of the payments, and at the same time a release was to be executed and deposited in the bank by the optionee, which was to be delivered to the optionor in event of default being made by the optionee in any of the terms of the option. Time was to be of the essence of the contract.

Clauses 4 and 5 (*ante*) do not seem applicable, because the option was given within a year, and, as to (4), for the reason that, adding together the \$12,000 paid under the option and the

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1930. 135,000 shares at \$1 per share, the minimum price was being
GREEN obtained. The provisions of the option, the price of the claims,
v. as well as the large amount spent afterwards by the optionee or
FRASER. his assigns (some \$200,000), indicate that the transaction into
Hodgins, which the parties had entered was an important one and likely
J.A. to cover some years before being entirely carried out.

The case, therefore, depends very largely upon the expression in the option that the defendant as trustee was invested with the ownership of the claims "for the purpose of sale and dealing with the claims," and the further provision that any question that might arise "in connection with the claims" was to be decided by the majority of interests, expressed at a meeting properly called.

It appears from the papers and evidence submitted that, as recited in the memorandum of agreement dated the 8th day of November, 1928, between the defendant and the McMillan Gold Mines Limited, who had succeeded to the position of Goldsborough, the option agreement had been amended and altered from time to time, and had finally, with the consent and approval of the optionor, been assigned to the McMillan Gold Mines Limited, by whom all the terms of the option as altered and amended had been carried out, up to the month of November, 1928. The time for payment of the instalments of the purchase-price was, at some time previous thereto, extended for a term of two years from their due date, as provided in the original option, and the last two payments were to be made as follows, \$10,000 on or before the 1st day of December, 1928, and \$24,000 on or before the 1st day of March, 1929. That carries the option down to the 8th November, 1928, as then in force, though with modified terms.

The memorandum of the 8th November, 1928, had apparently been preceded by an agreement bearing date the 18th October, 1926, whereby certain alterations in the terms of the agreement were agreed upon.

Later in the month of November, 1928, the plaintiffs and the other owners of the interests agreed with the defendant that they would accept the aforesaid 15,000 shares of the McMillan Gold Mines Limited, in certain proportions, which were to be applied on the payments due on the 1st December, 1928, and the 1st March, 1929. This agreement signed by the plaintiffs and the defendant, and the other parties, on the 20th November, 1928, sets out in more precise detail that the 15,000 shares were to be taken as equivalent to the sum of \$15,000, of which \$5,000 was to be allowed on the payment due on the 1st December, 1928, and \$10,000 on the payment due on the 1st March, 1929.

From the above it is quite apparent that down to the time when the defendant entered into the agreement of the 12th February, 1929, with the McMillan Gold Mines Limited, the option originally given in 1925 was alive and in force. It had been altered and amended, certain payments had been made and received thereunder, and mining operations had been carried on by the optionee and his assigns. Indeed, as is evident from an agreement of the 11th February, 1929, signed by all parties except the plaintiffs, it was recognised that the consenting parties were dealing with a valid and subsisting option agreement, and were professing to be carrying it out on certain altered terms then agreed upon. What was actually done was to sell the properties out and out, not pursuant to the then existing provisions of the option, but on entirely different terms and for a wholly different consideration. That consideration was, apart from a sum of \$3,000 in cash, the acceptance of 135,000 shares of the McMillan Gold Mines Limited stock at the par value of \$1 per share. Realising this fact and being doubtful of his powers, the defendant called a meeting, notifying all the parties, at which all except the plaintiffs agreed to his disposing of the properties in the manner proposed. The object of the meeting is thus set out in the notice:—

“The object of the meeting is to discuss the question of altering the terms of the option agreement made between the interest-holders and the McMillan Gold Mines Limited, dated February 15th, 1926, and the amendments thereto, by making a new agreement providing for taking stock in the company instead of the money payment as provided in the agreement, and to authorise the trustee to carry out the wishes of the meeting in that respect.”

The plaintiffs refused at the meeting to concur and questioned the defendant's power to enter into the contemplated agreement. Notwithstanding this, the trustee, while still doubtful of his power to do so, entered into the agreement now in question, on the following day, viz., the 12th February, 1929. Although the agreement of the 11th February, 1929, recites that it does not supersede but is in addition to the agreement of the 15th August, 1925, and while the agreement of the 12th February, 1928, professes only to alter the terms of payment under the option, what was then accomplished was a sale of the said claims to the McMillan Gold Mines Limited for \$3,000 cash and 135,000 shares of the capital stock of the said company, carrying with it the transfer of all the mining claims to the company and the issue of new stock therefor.

To my mind it was a complete and radical alteration of the

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situation and of the rights of the parties, whether considered as purporting to be the completion of the option agreement by a change in the consideration agreed therefor, or an out and out sale. Whichever it was, it was a change from cash to shares, the substitution of shares in the company, the value of which depended upon their market price, for a money consideration. I have no doubt that the abrupt change of position was a consequence of the refusal of the McMillan Gold Mines Limited to proceed under the option and to pay the instalments of the purchase-price, or to continue to develop the property. This is fully established by the evidence. The parties were, no doubt, faced with the disagreeable alternative of having their property depreciated in the eyes of the public by the surrender of the option after a very large expenditure of money had been made on its development, or of taking shares in the company, the value of which apparently was not at all equal to the original consideration mentioned in the option. Exploration had been found not to warrant payment of the original consideration, so that, unless the company exerted itself in other fields, its shares had not much prospect of being worth par. In order to obtain these shares, those interested were told that they must part with the ownership of their mining claims, which, up to this time, had been held in escrow by the bank, thus further emphasising the radical change in the situation and relationship of the parties.

I have no doubt that the trustee acted honestly. He had definite information, which he conveyed to the interest-holders; and, though he had doubts as to his powers, he felt impelled, under the circumstances, to take the risk of handing over the whole of the properties, receiving for the interested owners the shares in lieu of money. He did transfer all the claims to the company, and this the plaintiffs do not seek to recall as to their individual mining claims.

Under the circumstances I have outlined, the real question is, whether the defendant as trustee has acted reasonably. I can find nothing in the original agreement of 1925 which justified his carrying out the option on any basis except that which had been stated in the option or properly agreed upon under the authority of the initial agreement of 1925. His powers were expressly subject to the conditions mentioned in that document, and the main provision in it upon which reliance might be placed is that any question that might arise "in connection with the said claims" should be decided by the majority of interests. I think it is impossible to read into such a general and vague clause authority to make an entire change not only in the nature of the

consideration but in the security which the parties were to have for its payment, namely, the right to recover the deed of the properties held in escrow in the bank. One must read a power like that referred to as controlled by the whole scope of the agreement, having regard to the real effect of what was being done, and it is, I think, impossible to hold that any such complete alteration of the rights and interests of the parties is contemplated by the vesting in the trustee of the right to decide questions arising "in connection with the claims."

It was argued that the trustee took legal advice and should be excused. It was, however, not merely a question of the construction of the agreement. It was rather whether the contemplated transaction was at all within the purview of the original agreement, and it involved inquiry into a business matter, i.e., whether the shares of the company under the circumstances were either an adequate consideration or proper and valuable security, having regard to the results of the exploration upon the claims themselves, and also whether, having the properties in his hands, the trustee was in a business sense justified in parting with them so as to enable the company to sell its stock, while that company was insisting, as the agreement of the 12th February, 1929, provides, that the 135,000 shares should be pooled and so locked up, to be released only *pro tanto* on the arrival of each date for payment of the original instalments. These questions the trustee was bound to consider, and the advice of a solicitor upon the legal effect of the different clauses of the agreement did not solve either of them. As Stirling, J., said in *In re Stuart*, [1897] 2 Ch. 583, 591: "I think a man dealing with his own money would not act upon the opinion of his solicitor alone in a question as to the value of property proposed as a security."

Cozens-Hardy, M.R., in *In re Allsop*, [1914] 1 Ch. 1, 13, remarks: "In a large estate it may be only reasonable that he should consult counsel of the first rank or apply by originating summons for the direction of the Court."

In the substance of this remark Swinfen Eady, L.J., definitely concurs, and adds (p. 21) that the advice of the Court should be obtained "when the proper construction of an instrument is open to any serious doubt."

In *Whicher v. National Trust Co.* (1910), 22 O.L.R. 460, 466, Moss, C.J.O., speaks of the effect of the transaction as affecting relief under the statute; and, although the judgment of the Court of Appeal was reversed on appeal to the Privy Council because they thought the meaning of the trust deed was "plain" and the action of the trustee justified, his remarks and those of

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App. Div. Magee, J.A., have still weight where the contract or deed is ambiguous. He says:—

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“As pointed out by their Lordships of the Privy Council in *National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A.C. 373, at p. 381, it is not sufficient to entitle trustees to relief under the Act to establish that they acted honestly and reasonably. They must go further and satisfy the Court that under all the circumstances they ought fairly to be excused. The position of the defendants in the case at bar is not dissimilar to that of the appellants in that case. And it may be said of the defendants here, as was said in that case, that, without saying that the remedial provisions of the section should never be applied to a trustee in the position of the defendants, it is a circumstance to be taken into account, and there is not shewn any fair excuse for the breach of trust nor any reason why the plaintiff, who has committed no fault, should lose his money to relieve the defendants: see also *Davis v. Hutchings*, [1907] 1 Ch. 356.”

Magee, J.A., in the same case points out (p. 483): “The Act was not intended to allow a change of beneficiary or to excuse a trustee from liability if he paid to A. what should be paid to B., with whatever good intentions he may have acted. It would be a dangerous doctrine to enable a well-meaning trustee, simply by the exercise of his honest and reasonable judgment as to the construction of the terms of his trust, to deprive one man of his fortune and hand it to another.”

I am unable to hold that the trustee acted reasonably. The situation was, as I have indicated, a very serious one needing prompt decision. It meant the transfer of the whole properties and the acceptance, instead of money, of shares of uncertain value in a company. The need for haste was, no doubt, apparent, but a trustee who desires to be excused should realise that he runs great risk unless his business judgment is accurate, and the meaning of the trust instrument very clear. The trustee himself admits that his authority to do what he did under the original agreement was in some doubt, unless with the consent of the interest-holders, and the agreement of the 11th February, 1928, so recites.

Rule 604 says that where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined.

Rule 605 enacts that, “Where the rights of the parties depend upon the construction of any contract or agreement and there

are no material facts in dispute, . . . such rights may be determined upon originating notice."

This speedy process might have been resorted to, and should, I think, have been taken by a trustee, especially where objection is squarely raised at a meeting called to secure the approval of those interested.

It is not the province of the Court to advise a trustee upon the wisdom of a business proposition or attempt to approve or disapprove of the scheme, financial or otherwise, as to which the powers of the trustee are to be exercised, yet the Court must, in order properly to construe the terms of the document containing the trustee's powers, inform itself of the scope and effect of that which is proposed, so as to enable the trustee to apply the opinion of the Court to the circumstances in which he finds himself. The advice of the Court may indeed prove extremely useful in determining the wisdom or unwisdom of what is proposed, but I do not think the obtaining of it is in some cases all that is required. No doubt, had an application been made to the Court, or had the defendant consulted some one versed in such matters upon the merits of the proposition, it would have become apparent that not only did it involve an essential change in the character of the consideration, but that the words "any question that may arise in connection with the claims" could by no possibility be stretched to cover the tying up of the shares in a pool after the properties had been parted with and the shares had become the property of the interest-holders. The proposal to pool the shares finds no place in the notice given to the interest-holders. If the conveyance of the mining claims could be justified by the words above quoted, this fettering the owners in their dealing with what they received while the company was free to market its shares on the basis of its acquisition of the claims, was no question of properties, but an unjustified interference with their newly acquired property and rights. It is perhaps to be regretted that the plaintiffs were not present at the meeting, though their solicitor was there, and said the plaintiffs would not accept the pooled stock.

I am unable, however, to agree with the learned trial Judge in the amount which he has awarded as damages. The evidence makes it quite clear that the figures he mentions were figures referable only to the interest which the plaintiffs would have in the purchase-money if the option had been carried out on its original terms. The learned trial Judge at the hearing expressly recognised that, where he asked: "How can you claim \$4,900 from the trustee? He has not actually received the money, it was

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never paid to him. Nothing was paid to him." Further on, he says: "The amount due to the plaintiff as per statement of March 12th, 1929, before accepting the \$3,000, was \$4,956.20 each, that is if he actually received it. He did not receive it. Instead of receiving it he did something else." It is plain that what the plaintiffs lost were the properties belonging to them, which they had pooled and vested in the defendant, but they did not lose any chance of receiving their share of the purchase-money of the properties according to the option terms, because the optionee had, as appears from the evidence, definitely refused to carry it out, or to put up any more money. If the option dropped, the development would have to end, and the properties would go back to the interested holders. The optionee, after putting up \$200,000, had tried to sell the stock of the company and to raise enough to carry on further development, and was unable to do it on account of these outstanding payments, and the fact that it was not the owner of the properties themselves.

I think, therefore, that the judgment in the main should be affirmed, but the assessment of damages should be set aside, and it should be referred to the Master at Sudbury to ascertain the damages which the plaintiffs have suffered from the loss of their interests in their mining claims by reason of the conveyance made by the defendant to the McMillan company on the 12th February, 1929. With that alteration, I think the appeal should be dismissed with costs.

MIDDLETON, J.A.:—I find myself unable to accept the conclusions of the learned trial Judge.

Several owners of different mining claims dealt with them by an agreement of the 15th August, 1925. I place emphasis on certain parts of this agreement in my opinion too lightly passed over. The document recites that "the parties hereto have agreed each with the others that all the aforesaid mining claims shall be pooled, and each shall have an interest in the pool equal to the proportion which his individual claim bears to the total," and the claims are all to be conveyed to Fraser "for the purposes of sale" and he is given "full power to deal with the claims subject to the conditions hereinafter set forth."

The claims "may be sold together or separately, but if sold separately each one shall receive his proportion of the sale-price irrespective of in whose name the claim stood" prior to the agreement.

Fraser is given full power to deal with the claims "as if they were his own absolute property," subject to obtaining a price of \$150,000 for all or \$13,637 per claim. Should this minimum price not be obtained, the majority of interests "may agree to selling for a lesser sum, and the other interests shall be bound by such agreement." Should the claims not be sold or optioned in a year from the date of the agreement, "the majority of interests may then decide as to what further action shall be taken in connection with the said claims," and Fraser shall "then deal with the said claims as the majority of interests shall agree upon," and "any question in connection with the claims shall be decided by the majority of interests." Provision is then made for the calling of meetings to determine any question that may arise.

Several things are, I venture to think, plain. The claims theretofore held in severalty are to be "pooled," i.e., each owner ceases to own his claim, and in place thereof has an undivided interest in all the pooled claims. This is not a temporary thing, but is a final disposition of the properties, unless by a majority vote it shall be determined to dissolve the "pool" and return each parcel to its original owner.

Secondly, the claims are all vested in Fraser, who "may deal with them as he would deal with his own property subject to" certain limitations as to price, etc.

Thirdly, the equitable rights are not those of joint tenants or tenants in common. The majority may deal with all the properties as they may deem wise, and the minority is to be bound by the decision of the majority.

Fourthly, fixed limits of price are made for a year. At the end of this time, unless the properties are in the meantime optioned or sold, the majority must determine that which is to be then done. For greater caution, a clause is added making the majority govern "in any question that may arise in connection with the said claims," and Fraser is to "deal with the said claims as the majority of interests shall agree upon."

The claims were not sold, but were optioned within the year, in February, 1926. No question arises as to that agreement. The holders of the option have spent much money, but found little ore, and early in 1929 were in despair. They said that they would abandon all money paid and all money spent upon the mine and its development, some \$200,000, unless easier terms could be obtained, and they offered stock in lieu of cash.

A meeting was called. The majority, all except the two plaintiffs, agreed to accept that which was offered, not because the situation was pleasant, but as a choice of evils. If the mine

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Fraser was advised that it was his duty to obey the instructions of the majority, and he did so. The dissenting plaintiffs sue to recover their share of the cash unpaid on the option, although there is not a word of evidence to justify the idea that anything that could have been done would have enabled Fraser to receive this money. Judgment has passed against him for the amount claimed, \$4,956.20 in favour of each plaintiff.

In my opinion, Fraser was well advised. Under the terms of this agreement he was bound to deal with the property as the majority might determine, and this is what he did. I would, therefore, allow the appeal and dismiss the action with costs.

GRANT, J.A., agreed with MIDDLETON, J.A.

Appeal allowed (HODGINS, J.A., dissenting).

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MULVEY V. GENERAL ACCIDENT ASSURANCE CO. OF CANADA.

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Bankruptcy—Authorised Trustee Acting in Respect of Estate though not Appointed Trustee of it—Misappropriation of Moneys—Liability of Surety upon Security Bond—Bankruptcy Act, 1919, 9 & 10 Geo. V. ch. 36, sec. 14—Action by Special Trustee Representing the Crown—Amending Act, 13 & 14 Geo. V. ch. 31, sec. 17—Construction of Bond Given pursuant to Act.

Under the provisions of sec. 14 of the Bankruptcy Act, 1919, 9 & 10 Geo. V. ch. 36, R. was appointed by the Governor-General in Council an authorised trustee in bankruptcy. F., another authorised trustee, was duly appointed trustee in bankruptcy of the E. estate, and in July, 1925, made an arrangement with R. whereby he purported to transfer to R. the administration of that estate, and R. proceeded to deal with the estate as if he had become the authorised trustee thereof under the Act, although in fact he had never been appointed trustee. In March, 1928, F. resumed the administration of the estate, and it was found that, while in charge thereof, R. had misappropriated part of the estate. R. had, in 1922, given a bond to his Majesty, represented by the plaintiff, Under-Secretary of

State, the defendant company executing the bond as surety for R.'s faithful discharge of his duties, accounting and paying over, etc., as authorised trustee. The bond recited that it was given in pursuance of the Act; and subsecs. 4 and 5 of sec. 14 provide for the execution of a bond to his Majesty, represented by a designated departmental officer, who is to be "a special trustee for the creditors and for the estate:"—

Held, in an action upon the bond, that the security required by the Act applies only to an authorised trustee in bankruptcy after his appointment as trustee of an estate; R. did not act as an authorised trustee under the Act, but as a wrongdoer and contrary to the provisions of the Act; therefore the defendant company never became liable for his misconduct; and the action should be dismissed.

Per MAGEE, J.A.:—The effect of the amending Act of 1923, 13 & 14 Geo. V. ch. 31, sec. 17, was to prevent the applicability of the security given to the Crown under the Act of 1919 to subsequent bankruptcies, but to keep such security in force as to existing estates. The bond being given in 1922, F. being appointed trustee of the E. estate in 1924, and R. assuming to act for him only in 1928, no liability of the defendant company in regard to that estate arose, even if R. were acting as authorised trustee.

Per HODGINS, J.A.:—The bond contemplated additional authority being given under the Bankruptcy Act as to each estate, without which R.'s actions were without legal effect, and not those of an authorised trustee "under the said Act."

Kepp v. Wiggett (1850), 10 C.B. 35, applied.

AN appeal by the defendant company from the judgment of RANEY, J., at the trial of the action, in favour of the plaintiff, who sued, as Under-Secretary of State for Canada, upon a bond given by the defendant company as security for the fidelity of Henry Russell, an authorised trustee in bankruptcy, who though not appointed trustee of the bankrupt estate of one England, acted as trustee, under the supposed authority of Arthur S. Fitzgerald, who was an authorised trustee, and duly appointed trustee of the England estate. Moneys of the estate were misappropriated by Russell while in charge of the estate, and this action was brought upon the bond.

January 8. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

J. A. Macintosh, K.C., for the appellant company. The bond only becomes operative when the principal acts as an authorised trustee in respect to an estate, having been duly appointed under the provisions of the Bankruptcy Act, 9 & 10 Geo. V. ch. 36, secs. 14, 15, 16. Nothing was done in this case to substitute the principal as the authorised trustee for Fitzgerald, who was originally appointed. The fact that the principal may have intermeddled with the estate without any official position does not bring him within the terms of the bond.

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A. J. Gordon, for the plaintiff, respondent. The wording of the bond covers the case where the assured "acts as trustee." The assured in this case admittedly "acted" as the authorised trustee; and, even though he was not officially appointed, that should not affect the liability of the appellant company.

January 20. MULOCK, C.J.O.:—This is an appeal from *Raney, J.*

The cause of action set up by the plaintiff rests upon the following circumstances. On the 4th September, 1924, one Percy J. England made an assignment of his estate under the Bankruptcy Act to one Arthur S. Fitzgerald, an authorised trustee in bankruptcy, who was carrying on the business of authorised trustee in bankruptcy in the city of Windsor, and as such trustee the said Fitzgerald undertook to administer the estate; but, whilst it was still in his hands for administration, he entered into a written agreement bearing date the 1st day of July, 1925, with one Henry Russell, whereby he purported to transfer to him his said business, including the administration of the England estate, and thereupon Russell proceeded to deal with the estate as if he had become authorised trustee thereof under the Act, although in fact he had never been appointed such trustee. In March, 1928, Fitzgerald resumed the administration of the estate, and it was found that, whilst in charge thereof, Russell had misappropriated certain of its funds. Thereupon the plaintiff, claiming to be entitled to recover from the defendant company the amount so misappropriated, by reason of a certain bond given to his Majesty by the said Russell and the company, instituted this action. The bond was in the following terms:—

"Know all men by these presents that we, Henry Russell, of the city of Windsor, in the Province of Ontario, in the Dominion of Canada, hereinafter called the principal, and the General Accident Assurance Company of Canada, hereinafter called the surety, are jointly and severally bound unto our Sovereign Lord the King, his Heirs and Successors, represented by Thomas Mulvey, Under-Secretary of State, in the sum of \$15,000 lawful money of Canada to be paid to our Sovereign Lord the King, his Heirs and Successors, represented as aforesaid, for which payment well and faithfully to be made we bind ourselves and each and every of our respective heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents."

"Sealed with our respective seals and dated at the city of Toronto, in the Province of Ontario this 4th day of December, 1922.

"Whereas the principal has applied to be appointed an authorised trustee under the Bankruptcy Act, and when so appointed will be authorised and empowered to act as an authorised trustee in bankruptcy and under authorised assignments and in proceedings by insolvent debtors to secure compositions, extensions, and arrangements under the said Act, and this bond is given in pursuance of the said Act and amendments thereto.

"Now the condition of this obligation is such that, upon the granting of such appointment, the said principal shall, if he acts as an authorised trustee under the said Act, duly account for and pay over and transfer to the parties entitled thereto all moneys and properties received by him as such authorised trustee, and shall faithfully perform his duties as such authorised trustee, then this obligation shall be void and of no effect, but otherwise shall be and remain in full force and virtue.

"The surety agrees to pay any and all claims under this bond within 60 days after proof of claim shall have been furnished.

"Provided always that, if the surety shall at any time give three calendar months' notice in writing to the principal and to the Secretary of State of Canada for the time being of its intention to put an end to the suretyship hereby entered into, then this bond and all accruing responsibility on its part and of its funds and property shall from and after the last day of such three calendar months aforesaid cease and determine in so far as concerns any acts or deeds of the principal subsequent to such determination, remaining liable, however, hereon for all or any deeds, acts, or defaults done or committed by the principal as authorised trustee as aforesaid from the date of this bond up to such determination.

"In witness whereof the principal has hereunto set his hand and seal.

"Hy. Russell (seal).

"Witness: J. F. Twigg.

"And the surety has hereunto affixed its corporate seal verified by the signature of its assistant manager.

"The General Accident Assurance Company of Canada.

(L.S.)

W. A. Barrington, assistant manager."

For the plaintiff it was contended that, although Russell had not been appointed authorised trustee of the England estate, nevertheless he acted as such, and therefore his surety, the defendant company, because of the tenor of the bond, became liable to the plaintiff in respect of his default. The answer of the defendant company to this contention is that, Russell not having

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been appointed authorised trustee of the estate in question within the meaning of the Bankruptcy Act, the company was not bound by the bond.

The bond recites that it "is given in pursuance of the said Act (the Bankruptcy Act) and amendments thereto." Thus we may look to the Act in order to interpret the bond.

The only interest of the plaintiff in the estate in question is that of trustee for creditors. This relationship arises because of the following provisions of the Bankruptcy Act, 9 & 10 Geo. V. ch. 36, sec. 14, subsec. 4: "No authorised trustee shall accept any assignment or trust or execute any duties under this Act unless and until he has given security to the satisfaction of the Governor in Council, by bond or otherwise, executed to his Majesty as represented by such departmental officer as may be designated by the Governor in Council, for due accounting and for payment over and transfer of all moneys and property received by him as such trustee," etc. And by subsec. 5: "Such departmental officer shall be a special trustee for the creditors and for the estate."

But for those statutory provisions the plaintiff, having no beneficial interest in the moneys misappropriated by Russell, would not be entitled to maintain this action, and, in order to succeed, he must, in my opinion, shew that the bond sued on is one within the meaning of the subsections above quoted.

Subsection 4 prohibits any authorised trustee from becoming a trustee of an estate until he has given security for the due accounting for all moneys, etc., "received by him as such trustee." To become such trustee he must have accepted an assignment or trust or executed duties "under this Act."

From the time of his appointment Fitzgerald continued to be the authorised trustee of the estate, and Russell's purporting to be and acting as if its trustee did not constitute him a trustee "under the Act." On the contrary, he was doing what the Act forbade. Under the provisions of sec. 14 of the Act, the Governor in Council had appointed Russell a trustee in bankruptcy. The security required by the Act, in my opinion, applies only to an authorised trustee in bankruptcy after his appointment as trustee of an estate. This view, I think, is made abundantly clear by other provisions of sec. 14. For example, subsec. 7 requires a bond to be kept in force by the trustee until such time as the appointment of the trustee is revoked or until he rescinds such appointment. Subsection 8 provides for a trustee giving additional security "within 30 days of the date of the receiving order or the making of the assignment." Subsections 9 and 10 pro-

vide for the removal of a trustee and the appointment of a new authorised trustee in his place after he fails to give the additional security. The defendant company's liability as surety for Russell was conditional on his acting "as an authorised trustee under the Act." In my opinion, he did not act as such, but as a wrongdoer and contrary to the provisions of the Act, and therefore the defendant company never became liable in respect of his misconduct, and this appeal should be allowed with costs and the action be dismissed with costs.

MAGEE, J.A.:—I agree that this appeal should be allowed. Not only by the terms of the bond sued upon, but by the terms of the statute under which it was required—Bankruptcy Act, 1919, sec. 14 (4)—was the intended liability confined to the moneys and property which should be received by the defendant company's co-obligor Russell as an authorised trustee appointed under that section. In this case he did not receive either moneys or property in that capacity, but only as agent for the authorised trustee, Fitzgerald, who chose to allow Russell to act in his place, and to whom and whose surety under the statute the plaintiff, from all that appears in this case, should look if liability to the Crown exists.

The Act of 1919 created the office of authorised trustee, to which qualified persons were to be appointed, under sec. 14, by the Governor in Council; and, by secs. 4, 5, 6, 9, 13, such an authorised trustee was to be the trustee, whether in case of a creditors' petition, a voluntary assignment, or a composition or extension or arrangement.

In 1923, by 13 & 14 Geo. V. ch. 31, sec. 17, sec. 14 of the Act of 1919 was repealed, but it was provided that a person authorised as trustee and acting under a receiving order or assignment or in connection with a proposal for a composition, extension, or scheme, at the date of that Act of 1923 coming into force, should continue to act as such trustee, and that nothing in that sec. 17 was to have the effect of terminating the security theretofore given by such person; and such security was to be kept in force until the Governor in Council was satisfied that all moneys and properties received by the trustee had been duly accounted for and paid over. Corresponding amendments were made doing away with the necessity of appointing an authorised trustee.

The effect of this Act of 1923 was to prevent the applicability of the security given the Crown under the Act of 1919 to subsequent bankruptcies, but to keep such security in force as to existing estates. Now, here the bond sued upon was given in 1922,

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but even Mr. Fitzgerald was not made trustee till 1924, and Mr. Russell did not assume to act for him till 1925, and consequently no liability of the defendant company in regard to that estate arose, even if Mr. Russell were acting as trustee.

HODGINS, J.A.:—I agree, though reluctantly, in the allowance of this appeal.

The ambiguity in the bond is caused by the use of words "as such authorised trustee." Russell was appointed to the office of authorised trustee by the Governor-General in Council, pursuant to the Bankruptcy Act, and it became his duty under the terms of the bond sued on, "if he acts as an authorised trustee," to account and pay over, etc., "all moneys and properties received by him as such authorised trustee."

Russell never was appointed, in any of the ways pointed out in the Bankruptcy Act, to be the authorised trustee of any specific insolvent estate. But he received, under his agreement with Fitzgerald, moneys from debtors to estates of which Fitzgerald was the only appointed authorised trustee. In doing so he acted "as such authorised trustee" though wrongfully.

This bond, however, is on a form prescribed by order in council of the 5th July, 1920, and I think the ambiguity must be resolved against the plaintiff, as representing the Crown in right of the Dominion, who should not be heard to say that the bond, taken in advance of the actual appointment, was intended to cover anything but what the authorised trustee would be properly empowered to do thereafter when he was legally made administrator of some estate or estates pursuant to the provisions of the Bankruptcy Act. If it was intended to cover his wrongful acts, the bond should have been explicit on the point.

Russell, though acting "as such authorised trustee," had no authority to receive what he collected or to give receipts therefor. I think the view taken in *Kepp v. Wiggett* (1850), 10 C.B. 35, quite applicable here. Its effect is that, though a man may be appointed collector of taxes, he must yet be armed with such authority as will enable him to give legal discharge to the tax debtors. The bond was conditioned to be void if the collector did "duly, in pursuance of the said Acts, pay all such sums," etc. Jervis, C.J., puts the point clearly: "That he was appointed collector, is clear; but, was he ever armed with authority as such collector to receive the assessments under schedule (D.)? I am of opinion that he was not." Maule and Williams, JJ., in agreeing, say that "he had no authority lawfully to receive them" (the sums under schedule D.) "so as to bind the Crown, until

empowered to do so by the receipt of the duplicate assessments and warrant from the commissioner." Talfourd, J., also concurred.

Applying the *ratio decidendi* to this case, I think the bond contemplates additional authority being given under the Bankruptcy Act as to each estate, without which Russell's actions were without legal effect and not those of an authorised trustee "under the said Act."

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MIDDLETON and GRANT, JJ.A., agreed with the Chief Justice.

Appeal allowed.

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Negligence—Motor-vehicles upon Highway—Collision—Cause of—Evidence—Appeal—Affirmance by Majority of Appellate Court of Finding of Trial Judge.

The judgment of RANEY, J., 64 O.L.R. 323, was affirmed, and it was held (LATCHFORD, C.J., and RIDDELL, J.A., dissenting), that, upon the evidence, the defendant was not guilty of any negligence, and that the negligence of the plaintiff's husband was the sole cause of the collision of motor-vehicles whereby the plaintiff was injured.

AN appeal by the plaintiff from the judgment of RANEY, J., 64 O.L.R. 323.

November 7 and 8, 1929. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

T. N. Phelan, K.C., and J. P. Walsh, for the appellant, argued that the sole cause of the accident was the negligence of the defendant. If John Dent was guilty of any negligence (which was denied), such negligence did not cause or contribute to the accident. The learned trial Judge erred in finding that, while there was negligence on the part of the defendant which was a cause of injury to the appellant, she was not entitled to recover damages from the defendant. While denying negligence on the part of John Dent, counsel argued that, even if there were ultimate negligence on his part, the appellant was not guilty of negligence, nor in any way to blame for his negligence, if any. Reference to *Gray v. Peterborough Radial Railway Co.* (1920), 47 O.L.R. 540; *McCallum v. Bawden* (1924), 26 O.W.N. 364; *Ottawa Civic Hospital v. Gibson* (1929), 36 O.W.N. 200; *Winnipeg Electric Rail-*

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 1929. 352; *Till v. Town of Oakville* (1914), 31 O.L.R. 405; *Coop v.*
 Robert Simpson Co. (1918), 42 O.L.R. 488; 45 Corpus Juris, p.
 DENT 895; *Van Camp v. Anderson and Carter* (1928), 63 O.L.R. 257;
 v. Usher. *Carter v. Van Camp and Anderson*, [1929] 4 D.L.R. 625 (S.C.
 Can.)

D. L. McCarthy, K.C., and *W. F. Kerr*, K.C., for the defendant, respondent, contended that he was not guilty of any negligence whatever causing the accident. The sole cause of the accident was the reckless speed of the appellant's husband. Reference to *Ramsay v. Toronto Railway Co.* (1913), 30 O.L.R. 127.

January 31. LATCHFORD, C.J.:—This appeal is from a judgment of Mr. Justice Raney, of the 12th July, 1929, dismissing the action without costs.

The action was for damages occasioned at the village of Colborne, on the 24th September, 1928, about 4.30 p.m., when a collision occurred on the provincial highway between two Ford cars, one driven west by the plaintiff's husband, and the other east or north-east by the defendant. The plaintiff, accompanying her husband, was seriously injured and claimed \$15,000 damages.

Among the several grounds of negligence charged, the most material is:—

“(e) The defendant suddenly, and without any warning or regard for the on-coming traffic, altered the direction in which he was travelling, by endeavouring to turn into a lane at the north side of the said provincial highway, and, in so doing, struck the motor-car in which the plaintiff was driving, and caused the said injuries to the plaintiff.”

The defence was that Usher, after giving due notice, had started to turn towards a lane on the north side of the highway, and was barely moving when the car in which the plaintiff was travelling came along at a speed of 50 or 60 miles an hour, and was driven by her husband into the defendant's car, injuring him and damaging his car. Negligence on the part of the defendant was denied, and a settlement with the plaintiff's husband pleaded, thus:—

“4. The defendant further says that at the time of the accident, because of the ill-health of the wife of the defendant, who was leaving the following day for Plymouth, Michigan, with the defendant, to consult a physician there, the defendant and the plaintiff's husband, as representing himself and the plaintiff, came to an agreement with the defendant for the defendant to pay the damages to the car driven by the plaintiff's husband, in full settle-

ment of all claims of every kind and description, and which sum was paid prior to the institution of this action, and the plaintiff pleads such settlement as an answer and bar to the plaintiff's action."

The learned trial Judge decided that both the defendant and the plaintiff's husband were at fault in the respective proportions of one-third and two-thirds, but held that, as the latter had the last clear chance of avoiding the accident, he could not have recovered if he had brought an action for damages, and that his wife was in no better position. An estimate made fixed the damages which she sustained at \$3,000. The alleged settlement was found to be of only the husband's damages—what it cost for repairs to the car he was driving and \$10 out-of-pocket expenses to a local physician who had rendered first aid to the injured woman.

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The appeal is based on three grounds:—

(1) That the sole cause of the accident should have been found to be the negligence of the defendant.

(2) That there was error in finding that negligence on the part of John Dent caused or contributed to cause the accident.

(3) Error also in holding that, while there was negligence on the part of the defendant which was a cause of injury to the plaintiff, she was not entitled to recover damages from the defendant.

It appeared clearly from the arguments at bar, if indeed it was not conceded by counsel for the respondent, that, if the defendant's negligence was rightly found to have contributed to the accident, the plaintiff, not being guilty of any negligence, was entitled to recover damages for the injuries which she sustained.

Much learning was displayed on the argument of the appeal in dealing with the ultimate negligence attributed to the plaintiff's husband in the court below; but, in view of what developed later, the only point which I think material to be considered is whether the defendant was properly found to have negligently contributed to cause the accident. If so, he appears to me to be liable for the damages sustained by the plaintiff, notwithstanding concurrent negligence by her husband.

I extract from the reasons for judgment the parts which seem to me of importance.

[Quotation from pp. 324 and 325 of 64 O.L.R. of the paragraph beginning, "The negligence of the defendant consisted in," and that beginning, "But, notwithstanding the excessive speed."]

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After a careful study of the whole evidence, and with the utmost respect for the opinion of those who differ from me, I cannot but think the learned trial Judge was right in finding that negligence on the part of the defendant was established, and that his negligence was a contributing cause of the accident.

The evidence of the plaintiff's husband as to how the accident happened is clear and positive. To my mind it is largely convincingly true. Moreover, it is supported by the evidence of Heise and the significant fact that the defendant acknowledged his liability when charged by Dent with having caused the collision, paid the \$10 which surgical attendance for the plaintiff had cost, and agreed to pay for the repairs to the Dent car rendered necessary by the accident. That the settlement was actually pleaded in bar of the action, though no bar in law, as found, indicates to my mind that Usher realised fully that he was to blame, and wholly to blame, for the accident. True, he did not at the time apprehend any more than Dent himself how seriously the plaintiff had been injured. Usher is not only a blacksmith but is also a bailiff and municipal tax collector—avocations which call for the exercise of financial astuteness. Yet, without compulsion further than a threat that action would be brought against him for the damages he was accused of causing, the defendant paid Dent's expenses for the surgical aid rendered the plaintiff, and later, after he had ample time to reconsider his position, paid the cost of repairing the wrecked car. His statement that he did all this merely because he was anxious not to defer taking his wife on a trip to Michigan seems to me a most feeble excuse. He could have taken her there or anywhere else whether he agreed or did not agree to settle with the plaintiff's husband.

There is, I think, abundant evidence that if Usher was not wholly responsible for the collision he certainly contributed to cause it. The accident happened within the limits of the long, straggling village of Colborne, but at a point where farms extended on both sides of the road. Dent was unaware that he was passing through a village where the speed was limited to 20 miles an hour. He had left Belleville, 30 miles eastward, an hour and a quarter previously, and had ample time to reach in daylight his objective, Toronto, where he had reserved accommodation. His average speed had been moderate, though of course the average is not a test really applicable. Driving a light car on the main, in fact only, paved highway along the lake-shore between Toronto and Kingston, he had in the heavy traffic every reason to exercise great care, and none to drive at reckless speed. It is suggested as an

inference that Dent was tired. I can find no evidence to justify such a conclusion. It is Usher who was tired. He was asked on cross-examination:—

“And is it a fact that you were somewhat fatigued that afternoon? A. Well, you know a man of my age naturally becomes tired.” Later he said, “I was a little tired.”

How long Usher waited after McCracken’s car and the two following cars had passed him before he turned to cross to the north does not appear. He says that when he began to turn and when his left front wheel was over the centre line of the road the Dent car was a long distance away. In his examination in chief he was asked:—

“About how far down had you noticed him (Dent) after the other three cars had passed? A. 800 or 900 feet.

“Q. 800 or 900 feet farther down when you waited for him to come past? A. Yes.”

Usher had not stated that he was waiting for Dent to come past him, but he quickly adopted the suggestion in his counsel’s question, although he had just previously sworn that his car was “moving a trifle.”

On cross-examination he was asked: “Had you started to make the turn before the accident? A. I had not.

“Q. Did you (not) tell your solicitor (counsel was meant) that you had started to make the turn before the accident? A. I said I might have turned the front wheel, just merely turned it.

“Q. You had started to make the turn? A. Just a little.

“Q. Why did you not go on and turn north into the lane when he (Dent) was 900 feet away from you? A. I would not have had time the way he was coming.”

If Dent was 800 or 900 feet away when Usher was moving his car to the north-east with its left front wheel across the middle line of the road, he would have had 10 or 12 seconds to cross the intervening 10 feet of the pavement, and have his car clear before the 800 or 900 feet interval could have been compassed by Dent even at a speed of 50 miles an hour.

The defendant’s evidence on the point is incredible to me and was not credited by the trial Judge: otherwise the finding that Usher was negligent would not have been made.

The observation of Chief Justice Meredith in *Van Camp v. Anderson and Carter*, 63 O.L.R. at p. 258, quoted with approval in the Supreme Court of Canada in *Carter v. Van Camp and Anderson*, [1929] 4 D.L.R. at pp. 629, 630, by Duff, J., applies

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specifically to a car turned against a line of traffic. The learned Chief Justice said:—

“I think it is a common law and common sense duty that no one should turn against the traffic without great care in such a place as that where this accident happened.”

The observation applies with equal force to one who turns his car across a line of traffic in the circumstances that existed on the principal highway in central Ontario when the car driven by Usher attempted to cross the west-bound course of travel. The defendant's negligence contributed to the accident, and he is liable in my opinion for the damages suffered by the not-negligent plaintiff.

I would allow the appeal with costs, and adjudge the plaintiff entitled to \$3,000 with costs of action and trial.

RIDDELL, J.A.:—The plaintiff was in a Ford car driven by her husband, without her interference or assistance, going westward on the provincial highway in the village of Colborne. The defendant was driving east on the highway, intending to turn north on a side-line about the middle of the village, when the two cars came into collision and the plaintiff was injured—the amount of damages to which she is entitled, if entitled at all, the learned trial Judge fixes at \$3,000; this sum is not complained of by either party, and it seems fair under the facts.

I accept the findings of fact of the trial Judge in part, and think that the husband of the plaintiff was negligent in driving so fast that, when he saw the other car before him, he could not stop. I also think that the defendant was negligent in turning into the lane under the circumstances. The learned Judge, however, says that the husband “had the last clear chance to avoid the accident and he did not avail himself of it;” and so concludes that the negligence of the defendant was only a *causa sine quâ non*, and not a cause of the accident. I am unable to agree with this conclusion; the husband had put himself in the condition that he was unable to overcome the effect of his state when he saw the defendant's car. And that was the only negligence of which he was guilty; consequently both he and the defendant were guilty of a negligence which contributed to the accident. There was nothing in the nature of *novus actus interveniens*, no new negligence after the negligence of the defendant, no “ultimate negligence,” nothing but the original negligence continuing. Whether she has a cause of action against the husband we need not consider; she undoubtedly has a cause of action against the defendant for the full amount; I agree with the conclusion of the trial Judge, that she cannot be so identified with her husband in the circum-

stances of this case; husband and wife are now supposed to be two and no longer one.

There is, in my view, no need to go into the very interesting inquiry as to the application of the doctrines of ultimate negligence, last chance, and the like, so ably and exhaustively argued before us; the husband was negligent in driving too fast and the defendant in turning in as he did—each act of negligence contributed to the accident—each was a *causa causans*, and the one wrongdoer cannot escape paying the full damages.

The appeal should be allowed with costs; and judgment entered for the plaintiff for \$3,000 and costs in the court below.

The case of *Carter v. Van Camp and Anderson*, [1924] 4 D.L.R. 625, recently decided in the Supreme Court of Canada, will be found of great value if it should be necessary to go into the questions which I have not thought it necessary to consider.

MASTEN, J.A.:—Appeal from a judgment dated the 12th July, 1929, pronounced by Mr. Justice Raney after a trial before him without a jury. The action is for negligence occasioning a collision between motors on the Kingston highway, in consequence of which collision the plaintiff was injured.

Mr. McCarthy admitted that, if the defendant was guilty of negligence which either caused or contributed to the accident in question, he was liable for the whole damages to the plaintiff, who was not in control of either car, and he argued that the facts established that the defendant was not guilty of any negligence whatever.

Mr. Phelan, for the appellant, had argued at length in favour of the proposition of law which Mr. McCarthy admitted. It is therefore unnecessary to consider the law but only the facts.

Where two motors collide, one enters upon the consideration of the case with the impression that in the majority of instances both drivers are more or less to blame, and where one of the drivers is attempting to cross the line of on-coming traffic there is an initial presumption that he was principally to blame. Nevertheless in occasional instances the circumstances may rebut both of these presumptions; and, after most careful consideration of the whole evidence, I think that this was such a case.

I concur in the conclusion reached by my brother Fisher and I agree with his statement of facts and his analysis of the evidence. I desire to add only one or two observations:—

(1) The evidence satisfies me that the plaintiff's husband, who had driven through from Ottawa that day, was tired and the activity of his perceptive faculties dulled.

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(2) The plaintiff's husband admits that he first observed the defendant's car when he was 40 feet away from it. His theory that his view of that car was obscured by the three cars going east does not commend itself to me as tenable. On the evidence of the witness McCracken (being the driver of the first of these three cars) he met the plaintiff east of the Baptist Church, which is 560 feet from the lane referred to in the evidence, and would therefore be about 600 feet east from the scene of the accident. McCracken was followed by two other cars; but, according to the evidence, all three cars were close together, and the result is that the plaintiff's car would have met the last of the three cars at least 450 feet from the scene of the accident. The road was straight. It was broad daylight and so far as I can see there was nothing to have prevented the west-bound driver, Dent, from observing the defendant's car at a distance of 150 yards instead of 40 feet.

(3) The facts as to the part of the highway on which the plaintiff's car was travelling before the accident seem plain to me. Dent says that he was driving 2 feet only from the northerly edge of the pavement, and McCracken's evidence confirms this as being his position at the time when McCracken met him. But the evidence of the witnesses Quinn and Onyon as to skid-marks is convincing to my mind that for 18 feet east of the place of collision the west-bound car was travelling astride of the black line marking the centre of the pavement, and that the skid-marks swerved in a north-westerly direction. I think that, when Dent first observed the defendant's car only 40 feet in front of him, he tried to swerve his car northerly to his right, so as to pass on that side, but he failed to get entirely clear. The front part of his car escaped the defendant's car, but the broader part of his car collided with the left corner of the defendant's fender and struck a glancing blow, with the result that he continued north-westerly into the ditch and spun the defendant's car completely around in a circle, first north, then west, ending up in a south-westerly position.

(4) Regarding the position of the defendant's car, the evidence is directly contradictory. Dent says:—

“Q. And where would he (meaning defendant) be with reference to the centre line of the highway? A. Almost completely on my side of the road.”

The evidence of the defendant is confused, but, after reading it carefully two or three times, I understand him to say that he was 50 feet west of the lane into which he was proposing to turn; that he had stopped dead to allow three cars behind him to pass;

that after they passed he started up, edging towards the centre of the road, at a time when he was 50 feet west of the lane; that at the moment of impact his car was standing easterly with both hind wheels south of the middle line; that his front wheels turned to a direction somewhere between north-east and east; and that his left front wheel was two or three inches north of the black or middle line; also that he was scarcely moving.

He was a stupid witness, whose evidence was confused and sometimes contradictory, and slightly exaggerated, but the impression created on my mind is that he was an honest witness but confused and stupid as I have said.

I do not think that Dent was intending to swear falsely; but, having regard to his mistake with respect to the true position of his own car, I think the evidence of the defendant, as I have interpreted it, is to be preferred to that of Dent in regard to the position of the defendant's car. Moreover, if the defendant's car had been turned well north and was well over to the north side of the road, his car would have been hit by Dent not at the left of the fender but on the right side, amidships, and the defendant's car would have had no room to spin around and must have gone into the north ditch.

If the defendant's car was where he says it was, that is to my mind decisive of this action, for in that case Dent had the whole of the north half of the pavement except 3 inches in which to pass safely.

(5) With respect to the evidence of the witness Heise I note in the first place that he was driving easterly and at the very moment of the collision came to the top of a hill 1,100 feet from the accident. Any one who has been accustomed to try and see exactly what is going on at a distance of 366 yards will have some doubts about this witness's evidence. At one point:—

"Where was the northerly front wheel of the car (meaning Dent's car) at the moment of the impact with reference to the edge of the pavement? A. Either right at the edge of the pavement or slightly over the shoulder."

Or again:—

"Q. Could you tell us what direction the east-bound car was facing at the moment of impact? A. It was facing more of a north-easterly direction than easterly.

"Q. What would be the relation of the east-bound car to that lane at the moment of impact? A. I would say about 50 feet west."

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Methinks this witness doth attest too much for one sudden glance taken at a distance of 366 yards—almost one-quarter of a mile.

I have thus merely made a few observations on the facts, in confirmation and perhaps reiteration in different words of the

I would dismiss the appeal with costs.

ORDE, J.A.:—If in the present case our judgment depended solely upon the conclusions to be arrived at upon the written transcript of the evidence at the trial, without any assistance from the findings of the learned trial Judge, our task would be one of great difficulty. That difficulty is apparent from the fact that the other four members of the Court have divided evenly in their conclusions.

This division of opinion emphasises, in my judgment, the importance of adhering to the principle that findings of fact by the tribunal which has seen and heard the witnesses, whether that tribunal be judge or jury, ought not to be disturbed unless shewn to be clearly erroneous.

The evidence as to the facts which constituted the alleged negligence, both of the defendant and of the plaintiff's husband, is so contradictory that a mere reading of the transcript of it leaves one utterly confused as to which of the two was to blame. The learned trial Judge held that the defendant was negligent in turning to the left across the line of the west-bound traffic in order to enter the lane on the north side of the road. But he has also held that Dent was approaching from the east at an excessive rate of speed, and that he had ample opportunity to stop his car before striking Usher's car, and that his negligence was the proximate or real cause of the collision.

The argument before us was almost wholly based upon the contention that the learned trial Judge's finding of negligence on Usher's part was in reality a finding that he was guilty of contributory negligence, and some colour was given to this argument by some of the learned Judge's comments on the state of the law and by his fixing the amount of the plaintiff's damages. But it is quite evident, from his dismissal of the plaintiff's action, that, while he found the defendant guilty of negligence, his negligence was not contributory at all, in that it was not one of the effective causes of the collision, which was solely due to the negligence of Dent. There is evidence, other than that of Usher, which, if believed, tends to support that finding.

In these circumstances, I find myself unable to reverse the

findings of the learned trial Judge, and I think the appeal must be dismissed.

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FISHER, J.A.:—Appeal by the plaintiff from the judgment of Mr. Justice Raney in an action, tried without a jury, for personal injuries sustained in an automobile accident.

On the 24th September, 1928, the plaintiff's husband was driving an automobile, in which the plaintiff was the only passenger, in a westerly direction along a provincial highway, and, when within the limits of the Corporation of the Village of Colborne, collided with an automobile driven by the defendant in an easterly direction.

The trial Judge was of the opinion that both the plaintiff's husband and the defendant were negligent; that the primary negligence of the plaintiff's husband was excessive speed; that the plaintiff's husband was guilty of ultimate negligence; that the defendant's negligence was in starting to make a left-hand turn to the north side of the highway without making sure that he had time enough to clear the west-bound traffic; and that the plaintiff, if entitled to recover, should recover \$3,000 damages.

For the reasons given by my brothers Riddell and Orde, whose judgments I have had the advantage of reading, I agree that the finding of the trial Judge that there was ultimate negligence on the part of the plaintiff's husband is wrong, and must be set aside, but, with respect, I am unable to agree with their conclusion that the defendant was guilty of negligence.

Shortly, the evidence of the plaintiff's husband is that, as he was approaching the village of Colborne on the north side of the road, all at once the car belonging to the defendant turned out from behind the car which was just passing, and the defendant cut in to his side of the road and hit his car just about behind the hub of the left front wheel and drove him into the ditch; that the last of the three cars, which were travelling about 40 feet apart, and coming down from the west, had passed him when he was a little east of the lane (this is the lane leading into the Finkle farm on the north side of the highway); that his view of the defendant's car was obstructed by the passing cars; and that, when meeting these cars, he was east of this lane and was running within 2 feet of the northerly edge of the pavement, when he first observed the defendant's car, which was then 40 to 50 feet in front of him, and at this time the defendant was "turning into the lane;" that the defendant's car at the time of the impact "*was almost completely on my side of the road*;" that his car, after it was struck, landed in the ditch at the north 30 to 40 feet west of

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1930. side of the road; that the defendant turned his car to the north
DENT a second or two before the impact, and, to avoid hitting him, "I
v. swerved to my right towards the ditch;" that the cars came
USHER. together *before* the defendant reached the lane; that *because of his*
Fisher, J.A. *speedy application of the brakes they would leave a clear and dis-*
tinct impression on the highway.

D. M. Heise, a witness called by the plaintiff, stated that he was driving in his automobile in an easterly direction, and at a distance of about 1,100 feet west of the impact he saw the impact occur on the north side of the highway; that the west-bound car (the plaintiff's) *was either right at the edge of the pavement or slightly over on the shoulder*; that the point of impact on the plaintiff's car was "about half way back on the left front fender;" that the east-bound car was "facing more of a north-easterly direction than easterly;" that the impact took place 50 feet west of the lane; and that, after the impact, the plaintiff's car proceeded 12 to 15 feet into the ditch before it hit the sidewalk on the north side of the highway—that he did not inspect the skid-marks.

I shall now make a short reference to the evidence called on behalf of the defendant.

The defendant, who was formerly a blacksmith, but on the day of the accident was delivering bread, swore that he was driving easterly on the south side of the highway in a Ford coupé; that he was about stopped and was waiting for three cars coming up behind him to pass; and that, after they had all passed, he started to turn to the north to go into the farm of one Finkle, but, observing a car 800 or 900 feet away (the plaintiff's) coming from the east at the "speed of a steamboat," he waited for it to pass; and that, when about 50 feet west of the Finkle farm, with his front wheels about two inches over the centre, and his car about stopped, the plaintiff's car, with its left wheels running south of the centre black line, ran into his car, striking it about the centre of the bumper, and bent it or drove it near to the radiator, damaging his right front wheel; and described it as a head-on collision.

Alfred Quinn swore that he was standing in a field almost opposite the Finkle farm and a couple of hundred feet from the accident and saw it happen; that he saw the plaintiff's car coming from the west very fast, his opinion was between 40 and 50 miles per hour; that he could not see, from where he stood, whether the plaintiff's car was travelling south of the line or not; that he saw the defendant start to turn, but he was almost stopped, waiting, as he thought, for the west-bound car to pass, it being at that time

about 600 feet east; that he immediately went over to the place of the accident and viewed the skid-marks of the plaintiff's car; that the skid-marks were about 16 to 18 feet long and about 3 feet south of the centre black line, and as the skid-marks finished they were pointing towards the north-west; that the plaintiff's car struck the left front wheel of the defendant's car with such a force that it turned it right around to the north and then west on the south side of the highway, so that when it finished it was facing towards the south-west, and the plaintiff's car finished in the ditch to the west and north.

McCracken swore that he was the reeve of the township, was travelling east on the highway, and saw the defendant coming out of the farm belonging to one Scripture, which was about 40 rods to the west of the Finkle farm; that he met the plaintiff's car just east of the Baptist church, and the church would be about 560 feet east of the Finkle lane; that he noticed the plaintiff was driving at an excessive rate of speed, and thought he was going about 50 miles an hour; that after he heard the crash he went back and examined the skid-marks; *that they were half the width of a car to the south of the centre line*; the skid-marks appeared to be about 10 feet long and then they passed to the right hand side and on into the ditch, and when he passed the plaintiff's car it was running on the north side of the highway.

Onyon, a garage-man at Colborne, swore that he was asked by Dent to go down to the scene of the accident to get his car out of the ditch; that he could not say where the impact took place; that he examined the skid-marks and found they were *south of the centre of the black line about 2 feet*; *that the skid-marks started south of the centre line and were about 16 feet long*; that he examined Dent's car and it shewed that the crank was bent and bumper bent back in the middle and the left front wheel damaged and that the left front wheel of the Dent car was badly smashed.

Charles Turney, a resident of Colborne, swore that he went to the place of the accident shortly after it took place; that the skid-marks on the pavement were from the tyre-line into the ditch; that the skid-marks shewed that they were "tracked right from the centre of the tyre-streak right into the ditch;" that both marks were on the north side of the centre line; that he did *not see any marks south of the line*.

I think the foregoing summary is a fair statement of that part of the evidence which is of value for the consideration of the main points involved in this appeal. The first, and to me the most important, point, is to discover—the trial Judge not having so found

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Fisher, J.A.

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1930. and the next point is to ascertain whether the story told by the
DENT plaintiff's husband and the witness Heise is to be believed and
v. relied on in preference to the evidence of the defendant and his
USHER. witnesses; and in this connection I would like to note that, whilst
Fisher, J.A. it may be difficult in some cases for a Judge who is called upon to
try cases, and especially automobile accident cases, without the
aid of a jury, to say which witness or witnesses he prefers to be-
lieve, because in such cases the conflict is usually more severe than
in others, it would be of great assistance to the members of an
appellate court when appeals are taken, if they knew which wit-
ness or witnesses the trial Judge preferred to believe, as he has
had the advantage of observing the witnesses and their demeanour
when giving their testimony, and is in a much better position to
say who are the most to be relied on, and also, if possible, for the
trial Judge to find as nearly as he can exactly where the accident
took place.

In this case, if the plaintiff's husband and the witness Heise are to be believed, the impact took place wholly north of the centre of the highway; but Quinn, who actually saw the accident and went over and inspected the roadway a short time thereafter, states that the skid-marks were 3 feet south of the black centre line. McCracken, who was at the scene of the accident a few minutes after it occurred, swore that the skid-marks were about half the width of a car south of the centre black line. Onyon, who arrived at the scene of the accident about half an hour thereafter, swore that the skid-marks were about 2 feet south of the centre black line; and Turney says he did not see any skid-marks south of the line, but that they ran along the centre for some little distance.

If the plaintiff's husband was driving wholly on the north side of the highway—and according to the witness Heise a little over on the north shoulder—and if the plaintiff's husband was driving at an excessive rate of speed, upwards of 35 miles per hour, as found by the trial Judge, and if at the time of the impact the defendant's car was *wholly over or nearly so* on the north side of the highway and nearly stopped, and I think the evidence supports a finding that it was almost at a standstill, moving slowly, it is impossible for me to believe that there would not have been a terrific crash and that the automobiles would not have been almost totally destroyed. If the defendant's car was just at the centre of the highway and ready to turn to the north, it is idle to argue that the driver of the west-bound car, if he was over at the north edge of the highway, did not have an abundance of room to pass on the

north in perfect safety; and, if the car in which the plaintiff was driving was, a short distance before the impact, travelling south of the black centre line—and three independent witnesses swear it was—and the plaintiff's driver admits that the application of his brakes left a clear and distinct impression on the highway, then there can be little doubt, and a finding must be made, that the plaintiff's car was on the wrong side of the highway a moment or two before the impact, and that the driver swerved to the right in a diagonal or a north-westerly direction, missed the defendant's right front wheel, but caught or struck the fender and the left front of the defendant's car. That, in my opinion, is how this accident happened, and the fact that the defendant's car was whirled first to the north, and then around to the west and then south-westerly, was the natural result of an impact made in the manner I have attempted to describe. The defendant and I think one of his witnesses swore that it was a head-on collision. That could not be, as I understand head-on collisions, but I think what the witnesses meant was that it was a head-on collision in the sense that, when the plaintiff's car was, after it swerved, running in a north-westerly direction and caught the fender and left front wheel, they thought that was what is called a head-on collision.

Accidents with automobiles happen with such great suddenness that it is always difficult for witnesses to say—no matter how honest they may be—just exactly what happened and how it happened, and the same difficulty applies in accounting for the absence of injuries on particular parts of the automobiles, also as to the places where automobiles are found when they have finished after an accident, and therefore it is not to be wondered at that minor discrepancies will be found in the explanations given by several witnesses.

I think, too, it is only natural to expect that a witness in the position or class of the plaintiff's husband—a banker and an educated man—would be expected to give his evidence with greater ease and with more clearness than a witness such as the defendant, whose occupation was that of a blacksmith, and of his witnesses, and in fact all witnesses who are more or less nervous in testifying in open court, and are being put to severe tests by experienced counsel.

But, be that as it may, the outstanding fact is that we have here three independent witnesses, against whom no adverse reflections whatever were made by the trial Judge, positively identifying skid-marks some distance south of the black centre line, which to my mind conclusively proves that the driver of the west-

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bound car was momentarily on the wrong side of the highway—whether that was due to his being tired, as he had that day driven all the way from Ottawa, or to the excessive rate of speed at which he was travelling, I do not know—but, to avoid striking the defendant's car, he swerved to his right, with the unfortunate result that the plaintiff's wife was severally injured. How it is possible in these circumstances to hold that the defendant was guilty of any negligence is something I cannot understand. It is not to be overlooked that the plaintiff has failed to produce a single witness who examined the skid-marks, and the evidence of the defendant's three witnesses remains uncontradicted.

The attempt of the plaintiff's husband to excuse himself by saying that he could not see the defendant's car in time because of the passing of the three cars he was meeting, in my opinion only goes to shew how he is driven for an excuse to explain his omission to see, because the road was a level one and it was broad daylight, and if the plaintiff's husband was keeping a keen lookout, as he was bound to do, and especially when proceeding at an excessive rate of speed, as he was, there was never more than a flash of a moment when the defendant's car was not in full view, and I therefore adopt the view and the finding of the learned trial Judge that "the accident need not have happened if the plaintiff's husband had been as vigilant as he ought to have been. He admitted that he did not see the defendant's car till he was 40 or 50 feet away, but at the speed at which he was going it was too late to avoid the collision. There was nothing to prevent him from seeing the defendant if he had been looking."

My conclusions are, that the car in which the plaintiff was driving was being driven by her husband at an excessive rate of speed; that he was driving on the wrong side of the highway; that the onus was on the plaintiff to prove that the defendant was negligent, and she has failed; and, for these reasons, the sole and effective cause of the accident was the negligence of the driver of the plaintiff's car; and that the defendant was not guilty of any negligence.

The appeal must be dismissed with costs.

Appeal dismissed (LATCHFORD, C.J., and RIDDELL, J.A., *dissenting*).

[APPELLATE DIVISION.]

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Sale of Goods — Contract — Construction — Whether Conditional Sale Agreement — "Possession" not to Pass until Payment — Immediate Possession Given — Provision for Vendor Taking Possession upon Default — No Provision for Reselling — Vendor's Lien — Sale of Goods Act, R.S.O. 1927, ch. 163, secs. 38(1), 46(3) — Conditional Sales Act, R.S.O. 1927, ch. 165, secs. 2, 7 — Whether "Possession" to be Read as "Property."

The defendant and H. purchased from the plaintiff a team of horses for \$300, to be paid in weekly instalments. The terms of the bargain were embodied in a document signed by the defendant and H., in which they promised to pay the \$300 at the times stated in a schedule endorsed on the document, and it was provided that "possession of the said property shall not pass until this note is paid in full" and that the plaintiff "has full power to declare the note due and take possession of said property at any time he deems himself *unsecure*, even before the maturity of this note." Possession was in fact immediately given to the purchasers. Several instalments not having been paid, the plaintiff retook possession of the horses and sold them after giving notice to the purchasers, realising only \$90. Deducting the cost of retaking possession and of the sale and giving credit for what was left, the plaintiff sued the defendant for \$274.73, and recovered judgment for that amount:—

Held, upon appeal, that the parties did not really intend that possession should be retained by the plaintiff; the vendor doubtless meant to provide that the property in the horses should not pass until the note was paid in full; but in the course of the negotiations there was no stipulation that the property should not pass; and, while the provision as to possession might be ignored, never having been put into effect, the word "possession" could not be read as meaning "property," thus introducing a term which was no part of the oral bargain (RIDDELL, J.A., dissenting).

And *held*, by the majority of the Court, that the plaintiff had the right to repossess and resell the horses, and judgment was rightly given in his favour.

Sections 38 (1) and 46 (3) of the Sale of Goods Act and secs. 2 and 7 of the Conditional Sales Act, considered.

Sawyer v. Pringle (1891), 18 A.R. 218, *Stock v. Meyers & Cook* (1919), 46 O.L.R. 420, and *C.C. Motor Sales Ltd. v. Chan*, [1926] S.C.R. 485, referred to.

AN appeal by the defendant from the judgment of the District Court of the District of Temiskaming in favour of the plaintiff for the recovery of \$274.73 and costs in an action to recover a balance of the purchase-price of a team of horses. The terms of the bargain were stated in a document referred to as a lien-note or conditional sale agreement, and are set out below.

December 3, 1929. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, JJ.A.

J. W. Pickup, for the appellant. The conditional sale agreement or lien-note relied upon by the plaintiff contained no provision empowering him to resell the horses and make the defendant liable for payment of any deficiency remaining upon such

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resale. The plaintiff by reselling the horses abandoned any claim which he might have had against the defendant. There was no right given in the lien-note to sell, and so the plaintiff could not recover the balance of the purchase-price, because he put an end to the contract himself. The parties really considered that the property did not pass. It was a conditional sale. The plaintiff, having put himself in a position where he could not return the horses, could not sue for the balance: *Sawyer v. Pringle* (1891), 18 A.R. 218.

R. L. Kellock, for the plaintiff, respondent, said that he did not rely on the contract, but on an oral agreement. The property passed to the purchasers. The selling was the result of an agreement with the defendant's solicitor: Benjamin on Sale, 6th ed., p. 968.

January 31. ORDE, J.A.:—On the 27th August, 1928, the defendant, together with one Hume, purchased a team of horses from the plaintiff for the sum of \$300, to be paid in 12 consecutive weekly instalments, commencing one week after the date of the sale. The terms of the bargain were embodied in the following document which was signed by the defendant:—

Given for one chestnut team geldings, Hennessy horse
and Carr horse.

No. 30.

Instalment List

1 Week After Date

\$25.00

2 weeks after date \$25.00

3 " \$25.00

4 " \$25.00

5 " \$25.00

6 " \$25.00

7 " \$25.00

8 " \$25.00

9 " \$25.00

10 " \$25.00

11 " \$25.00

12 " \$25.00

Total \$

Reg. No.

Due

New Liskeard, Ont.,

Aug. 27th, 1928.

For value received I promise to pay W. D. Harris or order the sum of three hundred dollars, at New Liskeard, Ont., at the time or times stated in schedule of instalments hereon with interest at 8 per cent. per annum before and after maturity until paid.

Possession of the said property stated hereon shall not pass from the said W. D. Harris until this note is paid in full, and the said W. D. Harris has full power to declare this note due and take possession of said property at any time he deems himself unsecure, even before the maturity of this note.

Percy Hume.

Harry Tong.

Witnessed: W. H. Lowery.

Notwithstanding the written stipulation that "possession" was not to pass from the plaintiff until the note was paid in full, possession was in fact immediately given to the purchasers. The purchasers failed to pay any of the instalments as they became due, and up to the 17th October, 1928, all that the plaintiff had received from either purchaser was \$19, which was paid him by the defendant on the 28th September, 1928.

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On the 8th October, 1928, the plaintiff wrote the purchasers demanding payment of the arrears and threatening proceedings to recover. On the 13th October the plaintiff received a reply from Mr. Tuer, the defendant's solicitor, asking for information and suggesting that the plaintiff should call at his office and discuss a possible settlement.

The plaintiff thereupon had an interview with Mr. Tuer, at which was also present Mr. Lowery, who had acted as the plaintiff's agent in effecting the sale.

Both the plaintiff and Lowery say that Mr. Tuer suggested that the plaintiff should retake possession of the horses, and this is not contradicted. It is not so clear that Mr. Tuer authorised the plaintiff to resell the horses, and if he did it is very doubtful if he had any authority from the defendant to do so.

The defendant not only denies having given any such authority to his solicitor, but denies having purchased the horses at all. He gives a version of the transaction which, if true, seems a reasonable one, namely, that the real purchaser was Hume, who wanted the horses so that he might draw in wood for the defendant, and that the only obligation which the defendant was entering into was to withhold the moneys due Hume for the wood and to pay the same to the plaintiff in reduction of Hume's liability, and that he thought that was the nature of the document he signed. But the trial Judge has believed Lowery's evidence as to that, and it would be impossible without some more convincing evidence than that of the defendant himself to hold that his signature was procured by fraud.

On the 17th October, 1928, the plaintiff retook possession of the horses, and on the 26th October notified the defendant by letter that the horses would be sold by auction at 2 p.m. on the 10th November, 1928. The horses were sold and realised only \$90. After deducting the cost of retaking possession and of the sale, and giving credit for what was left, the plaintiff claimed from the defendant \$274.73, and for this sum judgment was given the plaintiff at the trial.

The only grounds of appeal are:—

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1 That the judgment of the learned Judge at the trial was contrary to the evidence.

2. That the conditional sale agreement or lien-note relied upon by the plaintiff in this action, and under which the plaintiff acted, contained no provision empowering the plaintiff to resell the horses referred to in the said conditional sale agreement or lien-note, and make the original purchaser, the defendant in this action, liable for payment of any deficiency remaining upon such resale; and that the plaintiff, by reselling the said horses, abandoned any claim or claims which he might have had against the defendant.

3. That the said horses were resold by the plaintiff without the authority of the defendant.

The first ground may be disregarded. The third ground presumably refers to the contention that the defendant, through Mr. Tuer, gave express authority to resell at the interview with the plaintiff above mentioned, and not to the absence of any express power in the sale agreement. If the plaintiff's right to recover depended upon any such subsequent authority given by Mr. Tuer on behalf of the defendant, the action would fail, not only because it is not clearly proved that Mr. Tuer ever went that far at the interview, but because there is no evidence whatever that the defendant ever authorised Mr. Tuer to consent to a resale.

The second ground, however, raises some questions which require careful consideration, especially because of the contention that the case comes within the decision of the Court of Appeal in *Sawyer v. Pringle*, 18 A.R. 218.

The exact rights of an unpaid vendor to recover the deficiency from a defaulting purchaser, after the vendor has resold at a loss, have in the past been the subject of much doubt and difficulty; the divergent views of the Judges, both in the Court of Appeal and below, in *Sawyer v. Pringle*, are evidence of that. The problem in each case was rendered difficult by the number of factors involved. For example, the property in the goods sold might have passed to the purchaser, but the possession remained with the owner, in which case the latter had his vendor's lien as security for the price. Or the possession had passed to the purchaser, but the property was expressly retained by the vendor; this was of course a "conditional sale," as we now term it. Or both property and possession passed to the purchaser; this would, if the contract gave no express right to the vendor to repossess, be a simple sale on credit from which no possible right of resale on default could arise. The matter might, however, be further complicated in any of the above cases by some express provision in the contract giving the

vendor the right either to retake the goods, or to resell the goods, or both, and the presence or absence of one or other of such provisions has had a bearing upon the result in many cases. Then there was the further question in some cases whether the vendor's retaking of possession was tortious, and therefore itself a breach of the contract on his part, or was permitted either by the terms of the contract or otherwise by the purchaser, and the further question whether such retaking of possession restored the vendor to his lien or to any rights arising therefrom.

I think that many of the former difficulties have been set at rest by certain provisions of the Sale of Goods Act, R.S.O. 1927, ch. 163, which was first enacted in Ontario in 1920, and of the Conditional Sales Act, R.S.O. 1927, ch. 165, which in its original form was first enacted in 1888. The important provision in subsec. 2 of sec. 7 of the Conditional Sales Act, as to the right of the vendor to look to the purchaser or hirer for any deficiency on a resale of the goods, was first enacted in 1911 by 1 Geo. V. ch. 30, sec. 8.

In applying the provisions of these two Acts to the present case, it may be useful to keep in mind a matter of some importance. It is a constant and perhaps not unnatural tendency, when considering a so-called codifying statute, to seek for the law as it was, or was believed to be, before the statute, and then to apply the relevant statutory provisions as confirmatory thereof. Now, no one will deny that the reasoning and conclusions of the Judges in the past often serve to illuminate the codifying statute, but they cannot be resorted to for the purpose either of nullifying or cutting down the effect of the direct and positive language of the Act, or of adding to the Act something which is not there. And it may not be amiss to quote in this respect the emphatic words of the late Lord Halsbury in *Bank of England v. Vagliano Brothers*, [1891] A.C. 107, where the effect of the Bills of Exchange Act (a codifying Act) was under discussion. At p. 120 he says:—

“It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to accept the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed.”

An apparent difficulty arises in the present case from the extraordinary stipulation in the contract that “possession” of the

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horses was not to pass from the vendor, followed by the provision that he had full power to take possession if he deemed himself "unsecure." That the parties did not intend that possession should be retained by the plaintiff is quite evident from the fact that possession was immediately given to the purchasers. And I have no doubt that the vendor really meant to provide that the property in the horses should not pass until the note was paid in full. But, if the question whether the property was not to pass to the purchasers is of importance as affecting the vendor's rights in the present case, I would find myself unable to accede to the argument that by the word "possession," where it first appears, both vendor and purchasers meant "property." There is no evidence whatever that in the course of the negotiations there was any stipulation that the property should not pass; and, in the absence of some such stipulation, the law is clear that, where the bargain is completed for the sale of a particular article, the property will immediately pass to the purchaser. I quite agree that the stipulation that the possession shall not pass from the vendor cannot have been intended, because it was never in fact put into effect, and must therefore be ignored. But it is one thing to hold that the stipulation, either by reason of its being contradicted by the later provision or because it was disregarded or waived, is to be ignored and quite another thing to read it as introducing into the contract a term which was never in fact a part of the oral bargain, and which, so far as any evidence shews, was not explained by the vendor or his agent as intended to be the meaning of the word. If we were called upon to reform the written contract, upon the evidence, I cannot see upon what theory we could do it. It is not what the vendor intended but what both parties intended that would govern in such case. The word "possession" does not mean "property;" and, when the sale of goods is concerned, the two terms express entirely distinct and in some essential respects quite opposite concepts, one affecting the physical destination of the goods, the other the abstract principle of ownership.

The action is brought for the balance of the purchase-price of the horses, and there is nothing in the statement of claim to indicate that the plaintiff treated the sale as a conditional one. That he so regarded it is fairly plain from the evidence and the fact that he held the horses for 20 days after the 5 days' notice of sale, as required by sec. 7 of the Conditional Sales Act. And the defendant, both in his statement of defence and in the second ground of his appeal above quoted, treats the transaction, if binding on him, as a conditional sale. His statement of defence refers to the agreement as a "conditional sales agreement," and alleges,

among other things, in effect, that, as it did not expressly give the plaintiff the right to resell and look to the purchasers for any deficiency, the plaintiff had no legal or contractual right to resell and claim the deficiency, and that by reselling he had abandoned his claim against the purchasers. In other words, he sets up substantially the defence that succeeded in *Sawyer v. Pringle*.

Notwithstanding the attitude of both plaintiff and defendant, it may be that neither has done anything to prejudice his rights, if upon a true construction of the contract it was not a conditional sale at all.

If it was in fact a term of the contract here that the property was not to pass from the vendor until the purchase-price was fully paid, then the contract was in substance the same as that in *Sawyer v. Pringle*, because in each case there was a provision for repossession but none for a resale by the vendor. So that, unless the Conditional Sales Act entitles the vendor to resell and recover the deficiency from the purchaser, we would be bound by that decision.

Whether *Sawyer v. Pringle* was rightly or wrongly decided, as the law then stood, may be a nice question for lawyers to discuss. The opinions of the majority of the Court of Appeal were opposed to that of the late Chancellor Boyd in the Chancery Divisional Court, and it is evident from the latter's judgment in the later case of *Arnold v. Playter* (1892), 22 O.R. 608, that he was not satisfied with the decision and that he followed it reluctantly. But, whether right or wrong, the theory of the opinion in the Court of Appeal is quite logical. The property not having passed, and there being no express power to resell, the vendors by reselling had put it out of their own power to perform the contract. They could not, therefore, enforce the contract by suing for the price, when they were no longer able to give the purchaser what he had bought. The three Judges who composed the majority of the Court were indeed all of the opinion that the transaction was not a sale at all. Hagarty, C.J.O., says at p. 221 of 18 A.R.: "This agreement cannot properly be called 'a contract of sale.' It is an executory agreement for a future sale on performance of certain named conditions by the defendant." Burton, J.A., at p. 227, says: "Here there was no sale strictly so-called; there was an executory and conditional contract of sale—that sale would become absolute and the property pass only on fulfilment of the conditions." And Osler, J.A., at p. 230, says: "Here the agreement between the parties is an executory one; merely a contract, as Lord Blackburn says, to transfer the property in consideration of the purchaser actually paying the price and not merely of his engagement to do so."

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Sawyer v. Pringle was tried shortly after the Conditional Sales Act of 1888, 51 Vict. ch. 19, came into force, but the cause of action had arisen before the Act, and the trial Judge, Armour, C.J., held that the Act was not retroactive and did not apply: (1890) 20 O.R. 111, at p. 113. But one thing is clear, that the contract there, as described by each of the three Judges mentioned, constituted what we now term a "conditional sale." Whether the provisions of the Act as it then stood would have assisted the plaintiffs might be a nice question if it were necessary to determine it. But, if the transaction here was in fact a conditional sale, the question is, what effect has the Conditional Sales Act in its present form, and especially the provision enacted first in 1911 as to the vendor's right upon a resale to look to the purchaser for any deficiency, upon the respective rights of the parties?

If we are to construe this contract as embodying a term that the property was not to pass until the price was fully paid, the contract was clearly a "conditional sale" within the meaning of the Conditional Sales Act. The Act does not in terms define a "conditional sale." That term is a comprehensive one, and probably includes contracts for the conditional sale of goods which do not come within the Act at all. But for the purpose of the Act the definition is in effect contained in sec. 2, which opens with the words: "Where possession of goods is delivered to a purchaser, or a proposed purchaser or hirer of them, in pursuance of a contract which provides that the ownership is to remain in the seller or lender for hire until payment of the purchase or consideration money or part of it." The contract here comes within that description.

That being the case, what are the respective rights of the vendor and of the purchasers when the vendor retakes possession upon default? Whatever they might have been before the Act, they are quite clearly affected by the provisions of sec. 7, which reads as follows:—

"7.—(1) Where the seller or lender retakes possession of the goods for breach of condition he shall retain them for 20 days, and the purchaser or hirer or his successor in interest may redeem the same within that period on payment of the amount then in arrear, together with interest and the actual costs and expenses of taking and keeping possession.

"(2) Where the purchase-price of the goods exceeds \$30, and the seller or lender intends to look to the purchaser or hirer for any deficiency on a resale of the goods, they shall not be resold until after notice in writing of the intended sale has been given to the purchaser or hirer or his successor in interest.

"(3) The notice shall be served personally upon or left at the residence or last known place of abode in Ontario of the purchaser or hirer or his successor in interest at least 5 days before the sale, or may be sent by registered post at least seven days before the sale addressed to the purchaser or hirer or his successor in interest at his last known post-office address.

"(4) The notice may be given during the 20 days mentioned in subsection 1.

"(5) This section shall apply notwithstanding any agreement to the contrary."

That this section has altered the law is clear, and it was distinctly so held by the Appellate Division in *Stock v. Meyers & Cook* (1919), 46 O.L.R. 420: see *per Meredith, C.J.O.*, at p. 432. The precise limits of the change may not be apparent, but this much is plain, that where by a contract of sale the property is to remain in the vendor until the performance of some condition, but the possession of the goods is given to the purchaser, the latter gets, in addition to his right to acquire an absolute title by performing the condition, a qualified title or interest, by virtue of the statute, which enables him, notwithstanding his default, to redeem the goods at any time within 20 days after the vendor retakes possession. And the statute clearly requires the vendor to retain the goods during that period in order that the purchaser may redeem them if he sees fit.

The radical change in the law governing the rights of the parties under that section is exemplified in the judgment of the Supreme Court of Canada in *C. C. Motor Sales Ltd. v. Chan*, [1926] S.C.R. 485. The British Columbia Conditional Sales Act was there under consideration, and the question was whether or not, when the vendor had retaken possession and sold at a profit, the surplus proceeds belonged to the purchaser, notwithstanding his default. The British Columbia Act, R.S.B.C. 1924 ch. 44, is more elaborate than ours, and sec. 10, which is in many respects the same as our sec. 7, contains some provisions which are not in ours. The British Columbia section opens with the words: "Where the seller retakes possession of the goods pursuant to any condition in the contract," which may mean an express condition entitling the vendor to retake possession upon default. Our section begins: "Where the seller or lender retakes possession of the goods for breach of condition." And, while subsec. 3 of the British Columbia section corresponds with subsec. 2 of our section, subsec. 2 of the British Columbia section gives to the vendor an express power to sell the goods if not redeemed within the 20 days, while our Act contains no such express provision.

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The Supreme Court of Canada in that case held that the relationship of the parties did not differ essentially from that of mortgagor and mortgagee. The contract there contained an express power to retake possession and to resell and an express undertaking by the purchaser to pay any deficiency.

While, therefore, neither the British Columbia Act nor the contract in that case is on all fours with our Act, or the contract here, the Supreme Court judgment is, in my opinion, far-reaching in that it lays down a broad principle as to the effect of statutes of this character upon the true relationship of the parties under a contract of this type. It is argued here that the absence of an express power to resell in the contract excludes the transaction from the operation of sec. 7, and that *Sawyer v. Pringle* therefore applies. But there is nothing in sec. 7 which makes its operation dependent upon contractual rights at all, and its terms are so obligatory upon the parties that subsec. 5 prohibits any agreement to the contrary.

The provision in subsec. 1 that the seller must keep the goods for 20 days after retaking possession, in order to give the purchaser an opportunity to redeem, is not expressed to be dependent upon any express power to retake possession, and is, I think, applicable to every conditional sale to which the Act applies, even though the contract contains no express provision for repossession. Whether or not there is a right to retake possession upon breach of a condition inherent in every case where the property in the goods remains in the vendor, as a necessary incident of ownership, does not seem to have been decided, though on principle it ought to be so. It is not necessary here to decide that. But, where the vendor has in fact retaken possession, it seems to me that he must retain the goods for 20 days under sec. 7(1), whether he regained that possession under the contract or not. That, I think, is the effect of *Stock v. Meyers & Cook, supra*.

Then as to the operation of subsec. 2. Is the right to look to the purchaser for any deficiency under that subsection confined to those cases where the contract expressly empowers the vendor to resell? If it is, then this anomaly results. The vendor, though holding the goods as owner, is nevertheless bound to retain them for 20 days, during which the purchaser has an equitable interest entitling him to redeem; but, if he sells after the 20 days, he sells the goods as his own and not merely to realise his security for the debt, and on the authority of *Sawyer v. Pringle* has no further recourse against the purchaser. The consequences might in many cases be disastrous. During the 20 days there might be an advantageous market for the goods or an opportunity to sell without loss,

but the vendor's hands are tied. He must retain the goods for the benefit of the purchaser. I am inclined to the view that subsec. 2 supplies for the vendor the compensating benefit for the restriction imposed by subsec. 1, and is intended to entitle him in every case, whether a right of resale is expressly given by the contract or not, to look to the purchaser for any deficiency.

That would be the only consistent conclusion to be drawn from the judgment of the Supreme Court in *C.C. Motors Sales Ltd. v. Chan, supra*. The statute has created, as between the conditional purchaser and the conditional vendor, when possession has been given to the purchaser, the relationship of mortgagor and mortgagee, so that the retention by the vendor of the property in the goods is to be regarded solely as a security for the payment of the purchase-price, for which the purchaser is still liable, with an absolute right to the purchaser, for 20 days after the vendor has retaken possession, to enforce the contract by payment and thereby to redeem and get back the goods, and with the corresponding right to the vendor, upon giving notice, to compel the purchaser to make good his default.

Section 7, in my judgment, has swept away most of the difficulties and refinements which gave the Court so much trouble in *Sawyer v. Pringle*. It has destroyed some of the fictions surrounding conditional contracts of sale and made the law conform to the realities thereof. When a man enters into a binding contract to buy some chattel, but agrees that, notwithstanding the immediate delivery of possession to himself, the vendor shall retain the ownership until the price is fully paid, the retention of ownership is unquestionably intended as a mere security for the payment of the price. Whatever the technical distinctions may be, the transaction is hardly to be distinguished from that of an absolute sale to the purchaser and a mortgage or reconveyance of the legal estate back to the vendor to secure the purchase-money.

If we apply the plain language of the section to the transaction, unhampered in construing it by the subtleties and refinements that entered into so many of the decisions before the Act, the situation is greatly simplified and the respective rights of the parties easily determined. And I am supported in this view of the effect of the section by the two cases of *C.C. Motor Sales Ltd. v. Chan* and *Stock v. Meyers & Cook*.

If the transaction is to be treated as a conditional sale, the plaintiff, having retained the goods for 20 days and given the defendant the required notice of the sale, is entitled to recover the deficiency from the defendant, notwithstanding the absence of any express power to resell in the contract.

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If, however, upon a proper construction of the contract, there was no provision that the property should remain in the vendor—and as already explained that is my view—what was the effect of the retaking of possession by the vendor and his sale of the goods after notice to the defendant?

The case now falls to be determined under the Sale of Goods Act. Where goods are sold, and the property passes to the purchaser but possession is retained by the vendor, he has of course his vendor's lien thereon for the price. If the vendor also gives up possession, he loses his lien. He waives it by giving up possession. But, according to Benjamin, the lien may be restored if possession is regained by the vendor with an intention on the part of the buyer that the right of lien shall revert: Benjamin on Sale, 6th ed., p. 968. The authorities given for this statement are not very satisfactory, but the statement seems sound in principle. In the present case not only were the horses voluntarily given up to the plaintiff, but the contract contained an express power to retake possession. I cannot interpret such a provision in a contract otherwise than as having the effect, upon the restoration of possession to the vendor, of reviving his lien. What other purpose could it serve, and of what practical value would possession be if it did not carry with it the right to hold the goods as security for payment, and what else is that right but a right of lien?

In what way may an unpaid vendor exercise his right of lien? It is unnecessary to discuss the difficulties involved in that question as they existed at common law. They are dealt with exhaustively in the earlier editions of Benjamin on Sale in the chapter dealing with "Remedies against the Goods—Resale," and to some extent in the same chapter (V.) in the 6th edition. But there can be no doubt that, whether we regard the Sale of Goods Act as merely embodying the law as it then stood, or as having changed it, some of its provisions, if applied, as they should be applied, in the way indicated by Lord Halsbury in the *Vagliano* case, have clarified the situation and removed some of the previous difficulties.

By sec. 38(1) the seller has by implication of law "a lien on the goods or right to retain them for the price while he is in possession of them."

Section 46 provides by subsec. 3 that: "Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not, within a reasonable time, pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract."

Nothing could be plainer than this language. And the editors of the 6th edition of Benjamin on Sale, at p. 1089, sum up the propositions deducible from the authorities and the Act in such a way as to make it quite plain that the vendor may "resell the goods without express power . . . when he gives notice of the intended resale," and may recover the deficiency from the purchaser (p. 1090).

In the present case notice was given on the 26th October of the intended sale on the 10th November, 15 days in all, which, having regard to this contract, gave the defendant a reasonable time for payment.

So that, in whichever way we look at this contract, the plaintiff is, in my opinion, entitled to recover.

As to the amount of the judgment, there is an odd discrepancy between the total claimed, namely \$274.73, for which judgment was entered, and the statement of the account in para. 2 of the statement of claim. This sets forth 5 items of \$15, \$1.50, \$48, \$2.75, and \$2, as comprising the expenses connected with the retaking of possession and the resale. The total is made to be \$83.73, but is in fact \$69.25. There is nothing in the evidence to explain the mistake, and no further item of expense was proved. The judgment below should be varied by reducing the amount thereof from \$274.73 to \$260.25.

As so varied, the judgment should be affirmed and the appeal dismissed with costs.

MASTEN, J.A.:—Appeal by the defendant from the judgment of the District Court of Temiskaming, dated the 9th October, 1929, in favour of the plaintiff for \$274.73 and costs in an action to recover the balance of the purchase-price of a team of horses.

I agree in the result proposed by my brother Orde, but the grounds on which I reach that conclusion vary in some respects from his. I adopt his statement of facts, and for the reasons stated by him I agree with his conclusion that the parties did not intend that possession of the horses should be retained by the plaintiff. From the internal evidence of the document itself and from the undisputed facts detailed in evidence it seems plain that the word "possession" must be disregarded. It may be that it was a slip of the pen of the plaintiff, who seems to have prepared the document in question, and that he meant to say "property," and not "possession." But this Court cannot, in the face of the evidence given by the defendant and without any reference in the evidence to the terms of the agreement, make a new contract for the parties and hold that where the agreement says "possession"

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App. Div. it means "property." As my brother Orde says, it would be
1930. impossible, as against the defendant Tong, to reform the docu-
HARRIS ment. It is not what the plaintiff Harris intended when he wrote
v. the agreement, but what the written document says, that governs,
Tong. and I find nothing in the context or in the evidence to warrant
Masten, J.A. our altering the word from "possession" to "property." See
Leake on Contracts, 7th ed., pp. 150 to 152, and Williston on
Contracts, vol. 2, para. 610, and cases cited in these two text-books.

Then, in the statement of defence of the defendant, para. 4 reads as follows:—

"The defendant alleges that the note or document referred to in the plaintiff's statement of claim and in the writ of summons is a conditional sales agreement or lien-note purporting to be signed by the said Percy Hume and the defendant."

I do not think that paragraph above quoted is an admission of fact, but rather that it is an incorrect assertion of law.

On the face of the agreement as written, there was a sale of a specific article to the buyers without any reservation to the seller of the property in the horses sold. An incorrect statement of the legal effect of the document cannot operate as an admission of fact that the property in the horses which, under the terms of the agreement as written, vested in the purchasers, did not so vest but remained in the plaintiff.

If I am right in that opinion, the document signed does not operate as a conditional sale agreement. The property in the horses passed to the purchasers and the Conditional Sales Act has no application.

Whether sec. 7 of the Conditional Sales Act is to be construed as giving by implication a power of sale to the vendor, when no such power is expressly provided either by the agreement or by the statute, is a question of wide and general importance as to which I prefer to reserve my opinion until it falls necessarily to be determined.

I am however of opinion that the plaintiff had power to sell and to sue for the balance. I feel a little doubt as to whether the evidence as to the terms on which Harris repossessed the horses is sufficient to bring the matter within the terms of the rule stated in Benjamin, 6th ed., p. 968, in the following terms:—

"A lien once lost is not revested by the mere fact that the seller afterwards obtains possession of the goods. Possession must be obtained with an intention on the part of the buyer that the right of lien shall revest."

Also it seems to me somewhat doubtful whether the cases referred to in support of the above statement warrant the text.

But, whether the rule applies or not, I think that when the horses were repossessed by Harris there was a plain implication that he took them to secure the balance of his claim, and that such was the understanding of the parties. Up to this point the course of events was as follows: first, the possession and the property in the horses passed to the buyers; secondly, the buyers being in default under the terms of the agreement of purchase, the seller resumed possession, whether by consent or under the terms of the agreement is immaterial, but upon such resumption of possession the property in the horses still remained vested in the buyers. Under these circumstances I think that the seller, the plaintiff, held the horses as a pledge to secure the balance due him, and as a pledgee had an implied power to sell and also to sue for any balance: *Prete v. Lauzon and Fenson* (1922), 52 O.L.R. 334; *Pigot v. Cubley* (1864), 15 C.B.N.S. 701; *Stubbs v. Slater*, [1910] 1 Ch. 632.

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If this is the true view of the situation after repossession by the plaintiff, the right of sale arises at common law and not under the Sale of Goods Act, R.S.O. 1927, ch. 163, sec. 57, subsec. 3.

The appeal should be dismissed with costs, with the variation proposed by my brother Orde.

LATCHFORD, C.J.—I agree in the result.

RIDDELL, J.A.:—The plaintiff being a horse-dealer, the defendant and one Hume wanting a team for immediate use, they bought from him a team, giving a note in the following terms (as set out in the judgment of ORDE, J.A., *supra*).

The purchasers making default, the plaintiff—who had given immediate delivery—took possession of the team, on the 17th October, under this lien-note; and in October sent to the defendant the following notice:—

“Oct. 26, 1928.

“Mr. Harry LeTong,
Restaurant Keeper
Main-street, Haileybury, Ont.

“Dear Sir:—I hereby give you notice of an auction sale to be held by me, which will take place at Wellington-street, New Liskeard, at 2 p.m. on Saturday, November 10, 1928, of team of horses which were repossessed by us about November (October) 17, on a lien-note for which you together with Percy Hume made in my favour.

“I herewith enclose copy of sale-bill.”

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—at—

TONG.

Harris Sale Stables.

Riddell, J.A. Wellington St., Town of New Liskeard,
at 2 o'clock in the afternoon on
Saturday, Nov. 10th,
1928.

By virtue of the powers contained in a certain lien-note, which will be produced at time of sale, there will be offered for sale by public auction one team horses, serviceably sound, weighing thirty hundred pounds.

W. D. Harris.

He went on and sold the team; and, after deducting expenses, credited the net proceeds on the note and sued for the balance. The learned District Court Judge of Temiskaming gave him judgment, and the defendant now appeals.

On the argument, an attempt was made to establish that the sale was actually made under a verbal arrangement with the defendant; but this wholly failed, there being no legal evidence to support such a finding. It is abundantly evident from the documents signed by the plaintiff himself that he was acting under the lien-note.

It is plain, I think, that the word "possession" at the beginning of the special provision of the note is really intended for "property:" as it seems to me, any other interpretation would be wholly inconsistent with the later provisions of the note as to taking possession on default, etc.

That being the case, we are bound by the decision of the Court of Appeal in *Sawyer v. Pringle*, 18 A.R. 218, to hold that the plaintiff cannot succeed. I would therefore allow the appeal and dismiss the action, both with costs.

Appeal dismissed (RIDDELL, J.A., dissenting).

[LOGIE. J.]

RE HAMILTON HARBOUR COMMISSIONERS.

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Feb. 3.

Trusts and Trustees—Harbour Commissioners—Compensation for Services—Trustee Act, R.S.O. 1927, ch. 150, secs. 60, 64—Hamilton Harbour Commissioners Act, 2 Geo. V. ch. 98 (Dom.)—Effect of sec. 16—Interest of Dominion Government—"Honorary Trustees"—Res Judicata—Whether Commissioners Officers of Dominion Government—B.N.A. Act, sec. 91 (8).

The Commissioners appointed under the Hamilton Harbour Commissioners Act, 2 Geo. V. ch. 98 (Dom.), to manage the business of the harbour, are entitled, under the Trustee Act, R.S.O. 1927, ch. 150, sec. 60, to reasonable compensation for their services.

Section 16 of the first-named Act considered; and *In re Commissioners of the Cobourg Town Trust* (1875), 22 Gr. 377, and *Re Toronto Harbour Commissioners* (1881), 28 Gr. 195, followed.

Upon the motion made by the Commissioners to the Court for an order for compensation, it was not necessary that the Dominion Government should be represented.

The Trustee Act applies to all trusts which are to be executed in Ontario: sec. 64; and the jurisdiction of the Court to hear and determine the application has not been excluded by reason of changes in the wording of the Act since the cases cited were determined.

The Commissioners are not to be regarded as "honorary trustees:" the *Cobourg* case, *supra*.

Assuming that the Commissioners had applied to the Dominion Government for compensation and had been refused it after consideration by the Governor in Council, the doctrine of *res judicata* had no application.

The Commissioners, although two of them are appointed by the Governor in Council, are not civil servants or officers of the Government, within the meaning of sec. 91 (8) of the British North America Act.

MOTION by the Hamilton Harbour Commissioners for an order and direction that a fair and reasonable allowance be made to them for their care, pains, and trouble, and time expended, in and about the trusts alleged to have been created and conferred upon them under the Hamilton Harbour Commissioners Act, 2 Geo. V. ch. 98 (Dom.), and for an order referring the matter to his Honour Walter T. Evans, Local Judge at Hamilton, as referee, with power to hear evidence therein, to determine and fix the amount of such compensation or allowance.*

* The Trustee Act, R.S.O. 1927, ch. 150, sec. 60, provides that "a trustee . . . shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the estate, as may be allowed by a judge of the Supreme Court or by any master or referee to whom the matter may be referred. (2) The amount of such compensation may be settled although the estate is not before the Court in an action."

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January 29. The motion was heard by LOGIE, J., as in Weekly Court, at a Hamilton sittings for the trial of actions.

The Hon. George Lynch-Staunton, K.C., for the applicants.

Frank Morison, for the mortgagees.

F. R. Waddell, K.C., for the Corporation of the City of Hamilton.

February 3. LOGIE, J:—The Hamilton Harbour Commissioners Act was assented to on the 1st April, 1912, and sets up a corporation consisting of three Commissioners, one to be appointed by the Council of the City of Hamilton and two by the Governor in Council. This corporation is given jurisdiction within the limits of the harbour of Hamilton with regard to water-front property, water-lots, piers, docks, shores, and beaches, but excepting private property or rights within the limits of the harbour. It has very wide powers to hold, administer, and acquire the property of or required for the harbour. The object of the appointment of the corporation was to use, develop, and maintain the water-front at Hamilton by constructing and maintaining docks, warehouses, equipment, and appliances for use in the carrying on of harbour or transportation business, and, in order to further this, subject to such provisions of the Railway Act as are applicable, to construct and operate railways, to own and operate plant and machinery, and generally to develop, maintain, and operate a harbour with full facilities. The corporation has, as incidental to its general powers, the power to borrow, to pass by-laws regulating and controlling the navigation and works, to impose harbour rates and recover them, including the power of seizure and detention of goods whenever any sum is due for rates in respect of such goods and is unpaid. The business of the corporation has reached large proportions, and is steadily increasing in volume.

Section 16 of the Act provides that any "surplus profits" belong to the city, and defines these surplus profits as those which remain "after providing for the cost of management of all the property which the corporation owns, controls, or manages . . . and after providing for the cost of works or improvements . . . and for the performance of the other duties imposed upon the corporation, and for capital charges and interest upon money borrowed by the corporation . . . and for all other liabilities of the corporation, and for a sinking fund to pay off any indebtedness incurred by the corporation."

The words "after providing for the cost of management" in a will or other private instrument creating a trust, involving the duty of management of the subject of the trust, would indicate

an intention on the part of the creator of the trust that the trustee should receive compensation for his services as part of the reasonable expenses of managing the trust estate, and would seem almost wide enough to enable the corporation itself to pass a by-law fixing the amount of compensation; but, even if there was power, there would have been a very grave lack of judgment on the part of the corporation if it had passed such a by-law; and the Commissioners adopted the proper course in submitting their rights to the Court.

In *Re Toronto Harbour Commissioners* (1881), 28 Gr. 195, at p. 197, under a similar statute, 13 & 14 Vict. ch. 80, which provided for the application of the tolls and revenues to be received by that Commission in the following words, "First, to the payment of all reasonable expenses of collecting the same and of managing the said harbour and works, and keeping the same in efficient repair," but made no provision for the remuneration of the Commissioners, Chancellor Spragge said:—

"The Dominion Government which must, of course, be assumed to be cognizant of the law of this Province in relation to compensation to trustees, has not thought fit to interpose its authority—assuming that it has authority—but has left the question of compensation to be governed by the law of the Province in which the trust is to be executed," and held that the Commissioners of the Toronto Harbour were entitled to compensation for their services, and this whether the harbour belonged to the Dominion or the Provincial Government, as in the event of its being found to belong to the Dominion it was to be assumed that the Dominion Government intended the Commissioners to be subject to the law of the Province in which the trust was to be administered."

The *Toronto Harbour Commissioners* case was never appealed, the then Chancellor following, as not distinguishable in principle, the case of *In re Commissioners of the Cobourg Town Trust* (1875), 22 Gr. 377, which was decided by the then Vice-Chancellor Proudfoot.

I am unable to distinguish the present case from that of the *Toronto Harbour Commissioners*, and am of opinion that the Hamilton Harbour Commissioners are entitled to such reasonable compensation for the services rendered as, in the words of Chancellor Spragge (at p. 198), "would not be an inducement to members of the city council or the board of trade, or others, to seek the office for the sake of emolument."

Mr. Waddell, in his able argument for the City of Hamilton, made a preliminary objection and strenuously insisted upon certain

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points which, he contended, distinguished the *Toronto* case from the *Hamilton* case, and in order that an appellate court, if the case goes further, may be assured that I have not overlooked these points, I shall deal with them seriatim.

His first objection was that the Dominion Government should have been represented. I overruled this objection, as, in my opinion, the Dominion Government had no interest in the matter in question.

He then argued that the Trustee Act has been changed since 1881 in such a way as to exclude the jurisdiction of this Court to hear and determine the matter in question. The Act then in force was ch. 107 of the Revised Statutes of Ontario, 1877, and did not contain the interpretation clauses now found in the Trustee Act, ch. 150 of R.S.O. 1927; and Mr. Waddell argued that, because by clause (e) of sec. 1 of the last named Act, "instrument" is defined as including "a deed, a will and a written document and an Act of this legislature, but not a judgment or order of a court," it was not open to me to construe an Act of the Dominion of Canada. I cannot accede to this narrow construction or limitation of the Ontario Act, particularly as the Act of 1927 provides, by sec. 64, that the provisions of that Act shall apply to all trusts whenever created and to all trustees whenever appointed. In my opinion, the Act extends to all trusts which are to be executed or administered in Ontario; and, besides, in allowing compensation to the Commissioners, I am not construing an "instrument."

Then Mr. Waddell argued that the Commissioners, if they are trustees at all, are to be considered as honorary trustees, who were never intended either as ask or receive remuneration. This argument is disposed of by Vice-Chancellor Proudfoot, who, after enumerating the duties of the trustees in the *Cobourg* case, said, *inter alia* (22 Gr. at pp. 379 and 380):—

"The enumeration of these duties suffices to shew that the labours of the Commissioners were of a very onerous kind—involving a very considerable responsibility, and the exercise of skill and care, and the expenditure of time and trouble, and incurring large responsibility and disabilities. It cannot be considered an *honorary trust* in the usual acceptance of the term."

And he pointed out that in the case of *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, while it was argued that the trustees, being a public body, performing a public duty under the authority of the Legislature, received no profit or emolument for the discharge of their duties, and incurred no liability, were yet held liable by the House of Lords for negligence.

Again, Mr. Waddell argued that the Hamilton Harbour Commissioners had applied to the Dominion Government for compensation and had been refused, that the Governor in Council had considered the matter, and that it was *res judicata*. "*Res judicata*" is defined as a rule applicable to the "ratio" where a final judicial decision has been pronounced by either an English or, with exceptions, a foreign judicial tribunal of competent jurisdiction over the parties and the subject-matter, by which any party or privy to such litigation as against any other party or privy, and in the case of a decision *in rem* any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning any such decision on the merits, whether as a foundation for an action or a bar to any claim, indictment, or complaint, or to any affirmative defence, case or allegation, if, but not unless, the party interested raises the point at the proper time and the proper manner. It is a question of fact, and the causes of action must be identical in substance.

Apart from the fact that there is no proper evidence before me that any such application was ever made by the Hamilton Harbour Commissioners, the rule of *res judicata* does not apply. Assuming that the Dominion Government refused to fix a compensation to the Commissioners, it may well be argued that the Governor in Council was aware of the *Toronto Commissioners* case and approved of the principle there laid down. In any event, in my opinion, for obvious reasons arising from the mere statement of the rule above set out, the doctrine of *res judicata* has no application.

Then again, Mr. Waddell argued that, because the British North America Act, by sec. 91 (8), gave exclusive jurisdiction to the Parliament of Canada in the matter of "the fixing of and providing for the salaries and allowances of civil and other officers of the Dominion of Canada," this Court has no jurisdiction to entertain this motion; that the Harbour Commissioners are officers of the Dominion of Canada and come within sec. 91 (8). It is sufficient, in my opinion, to say that the Commissioners appointed under the statute in question are neither civil servants nor other officers of the Government within the meaning of sec. 91 (8). The statute itself expressly constitutes them a corporation, and, while two of them are appointed by the Governor in Council, by no stretch of the imagination can these two be said to be either civil servants or officers of the Dominion Government. They constitute in fact a corporation with certain powers and obligations, but they are not either civil servants or officers of the Government within the meaning of the British North America Act.

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I think this covers all of Mr. Waddell's argument, and, as I said above, I am unable to agree with his contentions or distinguish this case from the *Toronto Harbour Commissioners* case.

There will be a declaration, therefore, that the Commissioners are entitled to such fair and reasonable allowance for their care, pains, and trouble, and their time expended in and about the trusts, as may be allowed by his Honour Judge Evans, to whom I refer the matter in order that he may, after hearing the evidence adduced, fix the amount, including the costs of the reference.

Costs of this motion, fixed at \$150 for each counsel, are to be paid by the corporation out of the funds in its hands.

[IN BANKRUPTCY.]

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RE STUART & SUTTERBY.

Feb. 7.

Bankruptcy—Jurisdiction of Registrar—Trial of Issue as to Damages Sustained by Reason of Receiving Order afterwards Rescinded—Undertaking of Petitioning Creditors—Appeal from Judgment of Registrar—Bankruptcy Act, sec. 159 (f)—Bankruptcy Rules 4, 92—"Matters and Applications"—Objection to Jurisdiction not Taken before Registrar—Acquiescence—Waiver—Treating Registrar as Arbitrator—Suggested Reference to Registrar—Prohibition—Punitive Damages.

The Registrar in Bankruptcy was held to have no jurisdiction to assess the damages sustained by a firm of traders by reason of an interim receiving order (containing the usual undertaking as to damages), made upon the petition of a company, and afterwards rescinded.

The Registrar heard oral evidence and determined the issue as to damages, purporting to act under Bankruptcy Rule 92, and it was contended by the petitioning creditors that the combined effect of that Rule, Rule 4, and sec. 159 (f) of the Bankruptcy Act, is to confer power upon the Registrar to exercise any jurisdiction that a Judge might exercise in Chambers:—

Held, that, while the Registrar has jurisdiction under sec. 159 (f) to make any order or exercise any jurisdiction which by any Rule in that behalf is prescribed as proper to be made or exercised in Chambers by the Registrar, his jurisdiction is confined solely to those cases and does not extend to cases that are by the Rules required to be heard by a Judge.

Rule 4 provides that all "matters and applications" may be heard in Chambers, but the trial of an issue is not "a matter or application."

The objection to the Registrar's jurisdiction was properly taken upon appeal by the petitioning creditors from his order; and the objection must prevail, notwithstanding that they had taken part in the proceedings before the Registrar without distinctly objecting to his jurisdiction: they had not thereby waived their right to appeal.

It was contended that by their conduct in proceeding before the Registrar the parties had constituted him an arbitrator from whose award no appeal lay:—

Held, there having been no arrangement between the parties that the Registrar should deal with the issue, but an assertion by the Registrar of his jurisdiction and a respectful submission by the parties, that they had not put him in the position of an arbitrator.

Canadian Pacific Railway Co. v. Fleming (1893), 22 Can. S.C.R. 33, distinguished.

Beaudry v. City of Montreal (1858), 11 Moore P.C. 399, and *Dominion Cannery Ltd. v. Costanza*, [1923] S.C.R. 46, followed.

The petitioning creditors' proper remedy was an appeal from the Registrar's order, not a motion for prohibition.

The *Dominion Cannery* case, *supra*, *Sani Products Ltd. v. Levine and Bazos* (1929), 63 O.L.R. 541, and *Re Levy and Jacobs* (1927), 61 O.L.R. 296, followed.

It would not be proper to make an order *nunc pro tunc* referring the issue to the Registrar for trial in order to cure an entire want of jurisdiction.

Semble, that punitive damages could not be awarded in respect of the undertaking contained in the receiving order.

AN appeal by the Pilot Automobile and Accident Insurance Company Ltd. (petitioning creditors) from an order or judgment of the Registrar in Bankruptcy, 11 C.B.R. 1, awarding to J.K. Stuart and William J. Sutterby, trading as Stuart & Sutterby, against the appellants, the sum of \$2,217, as damages sustained by Stuart & Sutterby by reason of an interim receiving order made upon the petition of the appellants and afterwards rescinded.

The appeal was heard by WRIGHT, J., sitting in Bankruptcy. *G. N. Shaver*, K.C., for the appellants.

G. T. Walsh, K.C., for Stuart and Sutterby, respondents.

February 7. WRIGHT, J.:—This is an appeal from the judgment of the Registrar in Bankruptcy whereby he awarded to the debtors the sum of \$2,217 for damages alleged to have been sustained by them owing to the appointment of the interim receiver.

In the notice of appeal several grounds are set forth, but I do not deem it necessary to examine or discuss all of them.

Upon argument the question was raised as to the jurisdiction of the Registrar to adjudicate upon the matters in issue, and I allowed the notice of appeal to be amended to bring this question before the Court.

The history of the matter, so far as pertinent to the appeal, is that on the 30th October, 1928, upon the application of the Pilot Automobile and Accident Insurance Company Ltd., an order was made by the Registrar in Bankruptcy appointing the Sterling Trusts Corporation to be interim receiver of the property of J.K.

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Wright, J. Stuart and William J. Sutterby, trading as Stuart & Sutterby.
1930. This order was in the usual form, and contained an undertaking
by the applicants to abide by any order the Court might make as
RE STUART. to damages in case it should hereafter be of opinion that the
& SUTTERBY. debtors had sustained any by reason of the order which the applic-
ants ought to pay and to be responsible for the proper performance
of the duties of the interim receiver.

By a subsequent order of the Registrar, made on the 7th November, 1928, this order was vacated and set aside, and thereafter the Registrar, upon the application of the debtors and purporting to act under the provisions of Bankruptcy Rule 92,* proceeded to hear and adjudicate with respect to the damages sustained by the debtors by reason of the appointment of the interim receiver.

The Registrar heard evidence at great length, and by his judgment awarded the debtors damages to the extent of \$2,217 under the following headings: (1) actual damages \$200 in respect of loss of profits, etc.; (2) damage in respect of the loss of a contract with one Tilley for repairs to his car, \$17; (3) exemplary or punitive damages in respect of wrongfully obtaining the order appointing an interim receiver and for the wilful misconduct of the interim receiver or its employees, \$2,000.

I shall proceed to deal with the question of jurisdiction first, as it appears to me to be one of great importance and general interest.

The duties of the Registrar in Bankruptcy are defined by sec. 159 of the Bankruptcy Act, which states that the Registrar shall have power and jurisdiction, subject to General Rules limiting the powers conferred by that section, in respect of several matters specifically set forth. The clause relevant to this inquiry is (f), which reads as follows: "to make any order or exercise any jurisdiction which by any Rule in that behalf is prescribed as proper to be made or exercised in Chambers."

For the respondent it is contended that this clause, read in conjunction with Bankruptcy Rules 4 and 92, confers jurisdiction upon the Registrar to adjudicate upon the claim of the debtor for damages arising out of the appointment of the interim receiver, etc., as was done in this case.

* 92. Where, after an order has been made appointing an interim receiver, the petition is dismissed, the Court shall, upon application to be made within 21 days from the date of the dismissal thereof, adjudicate with respect to any damages or claim thereto arising out of the appointment, including the proper remuneration of the interim receiver, and shall make such order as the Court thinks fit.

The contention is advanced that, as clause (f) of sec. 159 provides that the Registrar has power to make any order or exercise any jurisdiction which may be made or exercised in Chambers, and as Rule 4 provides that all matters and applications may be heard and determined in Chambers unless the Court or a Judge otherwise directs, the combined effect of these two provisions is to confer power upon the Registrar to exercise any jurisdiction that a Judge might exercise in Chambers.

I cannot accede to this argument and consider it to be unsound for several reasons.

In the first place, it will be observed that the various clauses of sec. 159 relate chiefly to *ex parte* and uncontested applications and do not refer to the trial of issues, either directly or indirectly.

It will be noted that under clause (e) the Registrar has jurisdiction to make interim orders in case of urgency only, and it would be anomalous, where his power to make interim orders is limited, that he should possess the plenary power to try an issue involving the substantive rights of the parties.

Some of the other subsections limit his jurisdiction to motions which are not opposed, so that he is not given absolute jurisdiction even in the case of motions.

If the contention advanced by counsel for the respondents should prevail then these results would follow:—

Under the various clauses of sec. 159 the Registrar has jurisdiction to hear and dispose of certain interlocutory applications if not opposed. If opposed, the same must be disposed of by the Judge, and under Rule 4 this could be done by such Judge in Chambers.

According to the contention of the respondent, clause (f) in effect confers upon the Registrar the jurisdiction to hear all applications, etc., and to exercise the jurisdiction of a Judge in Chambers.

The result would be that, while under some of the clauses the Registrar has jurisdiction to hear only unopposed applications, yet, by virtue of clause (f), he can hear all applications even if opposed.

This construction leads to absurdity, and such a construction of a statute must be avoided—see Craies on Statute Law, 3rd ed., pp. 83 and 84.

In adopting the other construction, that clause (f) limits the jurisdiction of the Registrar to duties which are assigned to the Registrar in Chambers, the other provisions of the statute and Rules are in harmony and not in conflict.

In my view, the proper construction to place upon clause (f) is that the Registrar has jurisdiction to make any order or exercise any jurisdiction which by any Rule in that behalf is prescribed as

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Wright, J. proper to be made or exercised in Chambers by the Registrar, and
1930. his jurisdiction is confined solely to those cases and does not
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& SUTTERBY. Judge.

The rule as to the construction of statutes which requires that the provisions of a statute or a particular section of a statute shall be read in connection with the context may well be invoked and applied in the construction of sec. 159: see *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142, particularly p. 162. This section specifies the maximum duties of the Registrar, and provides also that these duties may be limited, but does not authorise the rules to extend the jurisdiction. This point is also dealt with in a general way by subsec. 2 of sec. 161, which expressly declares that the General Rules shall not extend the jurisdiction of the Court.

Granted for the sake of argument that clause (f) of sec. 159 does confer upon the Registrar the power to exercise jurisdiction which a Judge of the Court could exercise in Chambers, I do not think that the provisions of Rule 4 enable the Judge in Bankruptcy to try issues in Chambers. It will be noted that this Rule states that all matters and applications may be heard in Chambers, but the question then arises, does the trial of an issue come within the term "matter or application." I think not. To me it appears that this covers only interlocutory proceedings such as motions and does not refer to or include the trial of an issue.

There is no definition of the word "matter" in the interpretation clauses of either the Act or Rules, so one is compelled to look elsewhere to ascertain its meaning.

In the Century Dictionary "matter" (in law) is defined as "A proceeding of a special nature, commenced by motion on petition or order to shew cause, etc., as distinguished from a formal action by one party against another."

To the like effect is the definition of "matter" in the Ontario Judicature Act, R.S.O. 1927, ch. 88, sec. 1 (n), where it is enacted that "Matter" shall include every proceeding in the Court not in a cause."

While the meaning assigned by the Ontario Judicature Act to the word "matter" is not conclusive as to the sense in which it is used in the Bankruptcy Act, yet it affords some indication of the general meaning of the word.

In my opinion, the word "matter" in legal proceedings bears the meaning assigned to it in the Century Dictionary.

In this view, "matter or application" does not include the trial of any issue in a regularly constituted proceeding.

Subsection 2 of sec. 152 of the Bankruptcy Act provides that, subject to the provisions of the Act and to General Rules, the Judge of the Court exercising jurisdiction in Bankruptcy may exercise in Chambers the whole or any part of his jurisdiction. This provision is, I think, modified or restricted by Rule 4, which authorises only matters and applications to be heard in Chambers.

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Rule 5 has also some bearing upon the questions raised here. This Rule provides that "A Registrar may without any general or special directions of the Judge hear and determine any matter and application referred to in sec. 159 (1) of the Act." A matter or application does not, according to the same reasoning, include the trial of an issue.

It is axiomatic that the trial of an issue involves the exercise of judicial powers or functions, and it will be helpful to examine the provisions of the Bankruptcy Act to ascertain upon whom judicial powers are conferred.

Section 156 of the Bankruptcy Act enacts that the Chief Justice of the Supreme Court of Ontario may nominate or assign a Judge of the Supreme Court to exercise the judicial powers and jurisdiction conferred by that Act; and this section, read in conjunction with sec. 152, indicates that to the Judges of the Supreme Court of Ontario are committed the judicial powers and jurisdiction conferred by the Act, and nowhere is there any judicial power given to or conferred on the Registrar except as specified in sec. 159.

Section 171 appears to have an important bearing on the point here raised. That section provides that the Court may direct any issue to be tried or inquiry to be made by any Judge or officer of any of the Courts of the Province; and, so far as I have been able to discover, that is the only provision in the Bankruptcy Act relating to the trial of an issue. The "Court" surely does not mean the officers of the Court. Were it so, a very anomalous situation would arise. The Registrar would have power to direct an issue to be tried by a Judge of the Supreme Court or a Judge of the County Court or of any other Court in the Province, and manifestly such construction would be contrary to the intention of the Act.

Neither the Rules nor the Act contemplate that the Registrar shall have absolute jurisdiction in all matters except as defined by sec. 159.

Upon reference to Rule 142, it appears that any motions to set aside transfers, conveyances, etc., or to declare for or against the title of the trustee in any proceedings under the Winding-up Act,

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1930. proceed in a summary way to try the question or issue.

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In the interpretation clauses of the Rules "Judge" is defined as the Judge to whom bankruptcy business is for the time being assigned in any Court having jurisdiction under the Act, or any other Judge having authority under the Act or these Rules to act. Under the provisions of this Rule (142) it could hardly be argued that the Registrar would have jurisdiction.

It would, in my view, require an express provision of the Act to confer upon the Registrar or any other officer of the Court the jurisdiction to act as a Judge, and this is what any officer trying an issue such as that raised in this case must assume to do.

Viewed from every angle, I think it is quite clear that the Registrar had no jurisdiction to hear and adjudicate upon the claim in this case, and my view is that the power to try the issue or direct it to be tried rests in the Judge of the Court alone, and that the only manner in which jurisdiction could be conferred upon the Registrar would be by a Judge of the Supreme Court referring the issue to him for trial.

The foregoing conclusion having been reached, there remains for consideration the question as to the right of the appellants to object to the jurisdiction of the Registrar after having taken part in the proceedings before that officer without distinctly objecting to his jurisdiction.

It appears that the respondents initiated the proceedings by serving upon the appellants a notice of motion returnable before Mr. Justice Fisher, who was at that time the Judge assigned to deal with bankruptcy matters, but when the solicitors appeared to argue the motion they were informed by the Registrar that it was within his jurisdiction to dispose of the matter, and thereafter he proceeded to try the issue, professedly under the provisions of Rule 92.

Under these circumstances, have the appellants waived their right to appeal from the judgment of the Registrar?

For the respondents it is contended that there has been a complete waiver, and in any case, assuming that the Registrar had no jurisdiction to adjudicate upon the issue, by their conduct in proceeding with the trial the parties had constituted the Registrar an arbitrator from whose award no appeal lies.

In support of the latter contention reliance is placed upon the decision of the Supreme Court of Canada in the case of *Canadian Pacific Railway Co. v. Fleming* (1893), 22 Can. S.C.R. 33, where the Court held that where, by an arrangement between the parties, matters that were *extra cursum curiæ* were dealt with by the

Court, its decision should be regarded as an award of arbitrators selected by the parties, and not subject to review or appeal as a judgment pronounced in the regular course of an action.

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The present situation is clearly distinguishable from the one existing in the case cited. In the latter case there was an express arrangement between the parties that the Court should deal with the matter. Here there was no such arrangement, but an assertion by the Registrar of his jurisdiction to try the issue, and a respectful submission by the parties to such claim or assertion of jurisdiction.

Such a situation was dealt with by the Judicial Committee in *Beaudry v. City of Montreal* (1858), reported in 11 Moore P.C. 399, where it was held that respectful acquiescence or submission to a ruling did not amount to a waiver of the right to contest such ruling; and that decision in my opinion applies to this case, and I hold that the appellants have not waived their right to appeal.

The question is fully dealt with by the present Chief Justice of Canada in the case of *Dominion Cannery Ltd. v. Costanza*, [1923] S.C.R. 46. See particularly at pp. 66, 67, and 68. At p. 66, Anglin, J. (now Chief Justice), cites the decision in *Archbishop of Dublin v. Trimleston* (1849), 12 Ir. Eq. R. 251, and *Toronto Railway Co. v. Toronto Corporation*, [1904] A.C. 809, as establishing the proposition that lack of jurisdiction to pronounce it deprives a judgment of any effect whatever.

Upon the argument it was contended by counsel for the respondents that the proper remedy for the appellants was a motion for prohibition, and not an appeal.

This point was dealt with by Mr. Justice Anglin in the *Dominion Cannery* case, at p. 67, where he states that prohibition is the remedy available in case of an excess of jurisdiction by an inferior court, but in the case of a superior court the remedy is by appeal. This view was taken by the Second Divisional Court in the case of *Sani Products Co. Ltd. v. Levine and Bazos* (1929), 63 O.L.R. 541.

The judgment of Mr. Justice Middleton in *Re Levy and Jacobs* (1927), 61 O.L.R. 296, deals with a situation very similar to that in the present case. In that case the learned Judge allowed an appeal from a local Judge on the ground that the latter had no jurisdiction to deal with the matter.

The counsel for the respondents urged me to make an order *nunc pro tunc* referring the issue to the Registrar for trial, but I think it would not be proper or justifiable to make such order to cure or heal an entire want of jurisdiction, and I decline to make such an order.

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It follows that the judgment pronounced by the Registrar in this case does not come within the ambit of his jurisdiction and the proceedings are *coram non judice*. Upon that ground the appeal should be allowed.

This matter is, in my view, of such importance that it is highly desirable it should be passed upon by an appellate court.

In any case I should allow the appeal as to the claim for punitive damages awarded by the Registrar.

The only damages that could be awarded would be the actual damages. Under the undertaking contained in the interim receiving order the petitioning creditors are only responsible in the terms of that undertaking for the actual damages sustained. In my view, the other questions should be determined in a substantive action to recover damages for maliciously setting the bankruptcy proceedings in motion and must be dealt with in that manner and not by way of an issue such as attempted here.

As the question of jurisdiction raises a new point, which was not pressed before the Registrar, I do not consider it to be a case for costs.

Appeal allowed and judgment set aside without costs.

[APPELLATE DIVISION.]

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ALEXANDER V. CANADIAN NATIONAL RAILWAY CO.

Feb. 17.

Negligence—Railway—Injury to Passenger Falling from Train—Conflicting Evidence—Indeterminate Finding of Jury—Responsibility for Vestibule-door being Left Open—New Trial—Action already Tried three Times—Place of Trial Changed—Defence of Statutory Time-limitation—Motion for Leave to Add—Discretion of Judge at New Trial.

The plaintiff alleged that he had been injured by falling from a train of the defendants in which he was a passenger, and charged negligence of the defendants' servants in leaving open the vestibule-door of a car, through which he fell. The action was tried three times, at the same place: at the first trial there was a verdict for the plaintiff for \$4,000; at the second trial the jury disagreed; and at the third there was a verdict and judgment for the plaintiff for \$10,000. The evidence at all the trials was contradictory. At the third trial, there was a finding of negligence, and to the question, "In what did such negligence consist," the jury answered, "By the south side of rear end of second-class car by trap and door of vestibule being open:"—

Held, that this answer, making the negligence the "being open" of the door, and not the opening or leaving of it open, and not indicating who opened it, or left it open, was not a finding upon which a judgment for the plaintiff could be based.

It is only where there is no other reasonable explanation of the accident, and where contributory negligence is negatived, that, in the absence of direct evidence of the cause of the accident, a verdict will be upheld.

McArthur v. Dominion Cartridge Co., [1905] A.C. 72, and *Ryan v. Canadian Pacific Railway Co.* (1916), 37 O.L.R. 543, applied.

The door might have been opened and left open by the plaintiff himself, or by other passengers, or by the servants of the defendants, and there was no finding as to where the blame lay.

A fourth trial was therefore ordered, and it was directed that it should be held at another place.

It was not necessary to decide whether the defendants should be allowed to amend by setting up the time-limit clause of the Railway Act; that (*per curiam*) should be left to the discretion of the Judge presiding at the new trial; or (*per MAGEE, J.A.*) should be disposed of before the plaintiff is put to the expense of preparing for another trial.

AN appeal by the defendants from the judgment of RANEY, J., upon the findings of the jury, in an action tried at Haileybury, in favour of the plaintiff for the recovery of \$10,000 damages for injuries sustained by him by falling from a train of the defendants, by reason, as alleged, of the negligence of the defendants in leaving a vestibule door open.

November 13, 1929. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

D. L. McCarthy, K.C., and *R. E. Laidlaw*, for the appellants. The learned trial Judge erred in refusing to allow an amendment to the statement of defence which would have completely answered the plaintiff's claim, i.e., the setting up of sec. 63 of the Government Railways Act, R.S.C. 1906, ch. 36, and the Canadian National Railways Act, 9 & 10 Geo. V. ch. 13, by which the time in which an action of this kind may be brought is limited. Even though the amendment was not applied for until after two trials, a statute of limitations has been held to be a meritorious defence and the amendment ought to have been allowed. The findings of the jury do not establish actionable negligence. The only duty imposed upon the appellants by the order of the Railway Board is that the brakesman and the conductor shall close the doors and keep them closed as far as it is possible for them to do so. Obviously the doors cannot be locked. If the door through which the plaintiff fell were opened by the plaintiff himself or by some other passenger, that would not be a contravention of the order of the Board and the appellants would not be responsible. In addition to proving the regulation and the fact that the door was open at the time of the accident, the plaintiff must prove that the door was open through the negligence of the appellants' employees, particularly having

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regard to their positive testimony that the door was closed a few moments before the accident. The verdict of the jury is perverse and against the weight of evidence. The damages are excessive.

A. G. Slaght, K.C., for the plaintiff, respondent. The learned trial Judge properly exercised his discretion in refusing the amendment sought by the appellants, on the ground of laches and delay, even though the defence sought to be set up may be a meritorious defence; and this Court should not interfere: Rule 130; *Holmsted's Judicature Act*, pp. 533 to 535; *Clark v. Wray* (1885), 31 Ch. D. 68. In any event, the statute applies only to actions for negligence of an officer, employee, or servant of the Crown. The Act was not intended to cover such a case as this. In 1925 the appellant railway company was a joint stock company. The Dominion Government, it is true, owned the stock, but the company was a separate entity with its own board of directors. The negligence here was that of the brakeman, who was an employee not of the Crown but of the company. The verdict of the jury is in no degree perverse. The evidence for the respondent and the evidence for the appellants are in direct conflict. The jury were instructed by the learned trial Judge to choose which was to be accepted. They having done so, their finding should not be disturbed. The charge to the jury together with their finding that the appellants were negligent, and that the negligence was in the trap-door being open, amounts to a finding that the door was opened by or to the knowledge of the employees of the appellants. That is the irresistible inference.

February 17. HODGINS, J.A.:—Appeal by the defendants from the judgment of Raney, J., after trial at Haileybury with a jury. The verdict was for \$10,000. There are four grounds of appeal:—

(1) Refusal to allow an amendment setting up the limitation of action found in the Act incorporating the defendants,

(2) That there was no evidence to sustain the jury's verdict,

(3) That the answers of the jury disclosed no negligence for which the defendants were responsible.

(4) That the damages were excessive.

The case has been tried three times, and at the same place. The first trial resulted in a verdict for the plaintiff for some \$4,000. On the second trial the jury disagreed. On all three occasions there was very contradictory evidence, the allegations of the plaintiff as to where and how he came to fall off and why, being diametrically opposed to evidence given on behalf of the defendants which charged him with having attempted to alight by jumping off before the train had stopped, with some bootleg whisky. Naturally it

was and is important to know whether the plaintiff, or some other individual, or any of the train-crew, opened the vestibule-door through which the plaintiff says he fell. The jury on the first occasion ignored that issue in finding for the plaintiff, because they attributed the plaintiff's injury to the opening of the vestibule-doors before the train had come to a stop, contrary to an order of the Railway Board. But the doors so opened were on the other side of the train from that from which he fell, and there was nothing to connect the accident with the negligence on which the jury had founded their verdict. (See *Alexander v. Canadian National Railway Co.* (1938), 34 O.W.N. 206). The same difficulty and the same contradictory evidence have been repeated on this occasion, while further equally contradictory evidence has been adduced. The plaintiff's evidence is strangely inconsistent, having regard to the doubt as to the coach from which he fell. He went, as he says, to the second-class coach from the first-class coach, and there bought and consumed some coco-cola, with some others. Then (as he says) he "walked back" to the second-class coach. He did not notice any open door in any of his perambulations, in fact, he says, he put out his hand to protect himself on the door [i.e. under the impression that it was closed] when the train gave a jerk, and, strange to say, he tells his counsel that when he was thrown through he does not know "whether or not it was open." The only station on the south or left hand side of the train, when going west between Cochrane and Kapuskasing, for which it would be necessary to open the south door, is called Jacksonboro, 31 miles from Kapuskasing. The doors on the north side would be opened for all the other stations.

Not only should the general principle that a jury ought to indicate their view of what the negligence consists of, and whose fault they conceive it to be, be applied here, but there is a plain reason why the jury should have definitely stated who they believed had opened the south rear vestibule trap-door on the second-class car. It appears from one of the plaintiff's witnesses, Gerard, that at Moonbeam, where the station is on the north side, he and Filion got off the south side of the train so that they could take a drink from a whisky-bottle which Filion had, their reason for descending being that Gerard or Filion (it is not quite clear which) had been fined \$100 for drinking whisky while on a train. As the doors to be opened for Moonbeam would be on the north side, this gives rise to the question whether one of these men opened the door on the south side for the purpose stated.

There is also evidence of passengers and train-men and the news-agent, who sold ice-cream, that the latter's ice-cream was,

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at the material time, on the vestibule trap of the platform on the south side of the second-class car (where the plaintiff said he fell through). This evidence the learned trial Judge described as "explicit" and so left it to the jury. Other questions arose which it is not necessary to discuss, such as whether the plaintiff jumped or fell off, and whether he had not a parcel of contraband liquor to land before the train stopped.

The jury have, in the face of the situation created by these conflicting allegations, made a finding which is of no use to an appellate court, in that it does not indicate clearly who opened the vestibule trap-door through which the plaintiff says he fell.

The learned trial Judge, as it seems to me, when the wording of their answer is considered, may have misled the jury by his statement, "*If these doors were open this railway company is responsible.*" If the doors were not open; if the ice-cream tub was there as this train came into Kapuskasing, this plaintiff could not have fallen off the train as he said he did."

The jury's finding in answer to the 2nd question, "If so, in what did such negligence consist?" is, "By the south side of rear end of second-class car by trap and door of vestibule *being open.*"

This leaves it in doubt as to whether the plaintiff himself opened or assisted to open the door and trap, whether Gerard and Filion did so in order to get out on the south side at Moonbeam to have a drink and then did not close it, or whether the defendants' servants opened and left it open, and does not indicate any clear answer as to where the blame lay. It makes the negligence the "being open" of the doors and not the opening or the leaving of them open. There were three reasonable inferences which might have been drawn from what was laid before the jury. The jury are not the judges of what is, in law, negligence. This is the province of the Court, which must decide whether or not what is found by the jury is or is not a negligent act or neglect of duty.

The observations in *Ryan v. Canadian Pacific Railway Co.* (1916), 37 O.L.R. 543, 546, directed to this point may properly be applied here:—

"There is a want of proper evidence of direct causal negligence and absence of intelligible expression by the jury of what they thought was a reasonable inference."

Applying the above, so long as counsel are willing to be content with a vague answer by the jury in the hope that out of it and the Judge's charge there may be extracted some definite finding, so long will the Court be compelled to direct new trials.

It must be remembered that it is only where there is no other reasonable explanation of the accident, and where contributory

negligence is negatived, that, in the absence of direct evidence of the cause of the accident, a verdict will be upheld: *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72.

As the case must go back for a more explicit finding, it is not necessary to decide whether the defendants should be allowed to set up the railway statute of limitations. That must be left to the trial Judge, whose discretion is to be exercised in relation to the facts proved before him. The damages seem excessive, but it is not desirable to say more than this at present.

It will, I think, be more satisfactory if we direct the new trial to be held at Cochrane next April.

Appeal allowed and new trial to be had at Cochrane. Costs of appeal to the appellants in any event, and costs of the last trial to be in the discretion of the trial Judge.

MULOCK, C.J.O., and MIDDLETON and GRANT, J.J.A., agreed with HODGINS, J.A.

MAGEE, J.A.:—As my Lord and the other members of the Court consider that in the interests of justice there should be a fourth trial, I do not dissent. I need not refer to the contradictory evidence or to details which may have to be dealt with in better light by the new jury. As to the place of trial we are far from the days when the proper arbiters were considered to be those of the vicinage. As to the defendants' proposal to amend by pleading that the action is barred by the statutory limitation of time, that should in my view be disposed of before the plaintiff is put to the expense of preparing for another trial, but it can be dealt with there.

Appeal allowed and new trial ordered.

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Feb. 18.

Police Magistrate—Offences against Highway Traffic Act, R.S.O. 1927, ch. 251, secs. 24, 40, 52—Conviction—Prior Irregularities—Waiver—Summons not Served in Time—Statutory Time-limit—Impossibility of Waiver.

E. was convicted by a police magistrate of two offences against the Highway Traffic Act. At the hearing he was not personally present, but was represented by counsel, and a plea of "not guilty" was entered:—

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Held, that the plea waived all prior irregularities.

The summons issued by the magistrate was not served within 10 days of the offences, as required by sec. 52 of the Act, and no evidence was adduced to shew that E. could not have been served within the time specified:—

Held, that the appearance and plea did not waive the delay; a statutory time-limit cannot be so waived.

MOTIONS by H. Ellerby to quash two convictions made against him by a police magistrate on the 16th January, 1930.

February 11. The motions were heard by MIDDLETON, J.A., in Chambers.

W. F. Greig, for the applicant.

J. D. Lucas, for the private prosecutor.

W. B. Common, for the Attorney-General.

February 18. MIDDLETON, J.A.:—Ellerby was convicted for that on the 4th day of December, 1929, he did unlawfully drive a motor-truck recklessly and negligently and in a manner dangerous to the public, contrary to the provisions of sec. 24 of the Highway Traffic Act, R.S.O. 1927, ch. 251. For this offence he was fined \$10. He was also convicted at the same time for another offence committed upon the same occasion, in that, as the result of the negligent driving, an accident occurred by which the motor-car of one Cook was damaged, and he (Ellerby) did not remain at or return to the scene of the accident and render assistance, and did not give his name and address when demanded, contrary to sec. 40 of the Highway Traffic Act. For this offence he was fined \$25.

Immediately after the happening of the accident, Cook made a complaint to the police magistrate.

By reason of Ellerby's failure to stop and refusal to give his name, Cook was unable to identify or give the name of the accused. He had, however, secured the number of the car, and this information was furnished to the magistrate, who, without difficulty, secured the name of the owner, and from the owner secured the name of the driver of the car on this occasion. Yet the magistrate, without any explanation of the delay, failed to issue a summons until the 28th December, 24 days after the occurrence. The summons was not served until the 3rd January.

At the hearing the accused was not personally present, but was represented by counsel, and a plea of "not guilty" was entered.

Objection is now taken to irregularity in the laying of the information. Without holding that there was in fact an irregularity, I do hold that the plea entered waived all prior irregular-

ities and that the conviction should not be quashed upon this ground. I rely upon *Rex v. Hughes* (1879), 4 Q.B.D. 614, and many other cases to the same effect.

The second objection, however, is much more serious. The Legislature has seen fit, by sec. 52 of the Highway Traffic Act, to require a summons issued for a violation of any of the provisions of the Act to be served within 10 days of the alleged offence, subject to the right of the magistrate to extend the time "on sufficient evidence being adduced to shew that the person summonsed could not be served within the time specified." Here there is not a suggestion of difficulty in serving; and there was no evidence produced before the magistrate, so far as the record appears—in fact the summons was not issued at all until long after the expiry of the time limited. By subsec. 2, there is the further proviso that, "On sufficient evidence being adduced to shew that by reason of the fault or unlawful act of the person to be summonsed a summons could not be issued and served within the time specified," the magistrate may extend the time for issuing and serving the summons. There was no attempt made here to bring the case within this subsection.

Mr. Common argued very strongly that the appearance and plea waived the delay in service. I do not think this follows. The statutory provision is a time-limit, and would not be thus waived.

I have not the least doubt as to the guilt of the accused, and greatly regret that the convictions must be quashed by reason of the inexplicable failure on the part of the magistrate to issue a summons and have it served within the time limited. As the Attorney-General was represented upon this motion, this will undoubtedly be inquired into by those in authority.

The convictions are therefore quashed without costs and with the usual order for the protection of the magistrate.

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[APPELLATE DIVISION.]

SANDS V. GREER.

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Feb. 25.

Negligence—Motor-vehicles upon Highway—Collision at Intersection of Streets—Right of Way—Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 35(1)—Evidence—View of Approaching Vehicle—Speed—Drivers Equally at Fault—Equal Division of Aggregate Amount of Damages.

A collision of two motor-vehicles occurred at the intersection of two city streets. The plaintiff's vehicle was going east on the south side of H-street and the defendant's north on the east side of L-street. Neither party slackened speed:—

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Held, that, as the defendant was approaching on the right hand of the plaintiff, the defendant's vehicle had the right of way: sec. 35(1) of the Highway Traffic Act.

The plaintiff contended that the statute did not apply because as he was approaching the intersection, the defendant was so far away that he could not be seen; but the fact of the collision occurring within the square formed by the intersection of the two streets made it plain that the defendant's vehicle must have been in sight for a considerable time before the collision; and the statute did apply.

The plaintiff also contended that, as the collision occurred at the east side of L-street and the south side of H-street, it was plain that the plaintiff entered on the west limit of the square before the defendant reached the south limit, and consequently the plaintiff had the right of way notwithstanding the statute:—

Held, that the mere fact that the traveller holding the servient position reaches the limit of the intersection first, while relevant evidence, does not of itself give him the right of way.

Hanley v. Hayes (1924), 55 O.L.R. 361, and *Van Camp v. Anderson* (1928), 63 O.L.R. 257, applied and followed.

Held, also, that both parties were driving without taking such care as the circumstances called for, both were guilty of negligence contributing to the accident, and the resulting damage should be borne equally.

AN appeal by the defendant from the judgment of the County Court of the County of York (O'CONNELL, Jun. Co. C. J.) in favour of the plaintiff for the recovery of \$231.85 damages and dismissing the defendant's counterclaim. The action and counterclaim arose out of a collision of motor-vehicles upon a highway, the plaintiff and defendant alleging negligence each of the other.

February 10. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

R. D. Humphreys, for the appellant, contended that both automobiles were travelling at approximately the same rate of speed and they entered the intersection at practically the same moment of time and so an accident was inevitable. When such are the facts, the deciding question is, "Who has the right of way?" In the present case the appellant had the right of way on account of his automobile being to the right of the automobile driven by the respondent. Therefore he is entitled to judgment.

H. H. Shaver, K.C., for the plaintiff, respondent, argued that he could not see the automobile driven by the appellant as he approached the intersection. The respondent had the right of way, as his car was in the middle of the intersection before the appellant's automobile entered the intersection. The appellant was solely to blame for the accident which followed, on account of driving his automobile at an excessive rate of speed.

February 25. The judgment of the Court was read by MASTEN, J.A.:—All except one of the various grounds of appeal raised by

counsel for the appellant were overruled during the argument. The ground reserved relates to the relative rights and obligations of persons who approach an intersection of two streets in such a manner that there is danger of a collision.

The collision in question occurred at the south-easterly quadrant of the intersection of Harbord-street and Lippincott-street, in the City of Toronto.

The plaintiff was proceeding east on the southerly part of Harbord-street. The defendant was going north on the east side of Lippincott-street.

In the present case the collision shews that the plaintiff and the defendant were approaching the intersection of Lippincott-street and Harbord-street under such conditions that if both proceeded without slackening their speed a collision was imminent. It does not appear from the evidence that either party slackened speed, and a collision occurred. The trial Judge has found that the defendant was solely to blame, and in appeal this Court cannot say but that he was guilty of some negligence contributing directly to the accident, but I think it is plain on the evidence that the plaintiff also was guilty of negligence which contributed to the accident.

The Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 35, subsec. 1, reads as follows:—

“Where two persons in charge of vehicles or on horseback approach a cross-road or intersection at the same time, the person to the right hand of the other vehicle or horseman shall have the right of way.”

As the appellant was approaching on the right hand of the respondent, the statute gave to the appellant’s motor-vehicle the right of way.

Counsel for the respondent submits that in the circumstances of this case the statute does not apply, because, as the respondent was approaching the square forming the street intersection, the appellant was so far away that he could not be seen. The respondent says he looked once to his right as he was approaching the intersection and that he did not see the appellant’s vehicle. From this he draws the inference that the appellant’s vehicle must have been so far away that it could not be seen, and the further inference that it must have approached at terrific speed or the collision would not have happened. And he supports this inference as to the excessive speed of the defendant’s car by reference to the evidence of the witness Hollefriend, but the only estimate that witness gives of the defendant’s speed is at p. 43, line 20, of

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App. Div. the evidence, where he estimates the defendant's speed at 20 miles
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Considering what is disclosed in the evidence with respect to the buildings at the south-east corner of the intersection, the length of view obtainable, and the evidence as to speed, I think the respondent's inferences are unwarranted, and the fact of the collision being within the square forming the intersection of the two streets makes it plain that the defendant's vehicle must have been in sight for some considerable distance before the collision occurred.

The second point of counsel for the plaintiff is that, as the collision happened on the east side of Lippincott-street and the south side of Harbord-street, it is plain that the plaintiff had entered on the western limit of the square forming the intersection, before the defendant reached the south limit of the square, and consequently that the plaintiff had the right of way notwithstanding the terms of the statute.

This last suggestion is a misstatement of the law which is widely held even by learned members of the legal profession.

In *Hanley v. Hayes* (1924), 55 O.L.R. 361, this Court interpreted the effect of the section as follows:—

"Though the driver on the right is given right of way by the statute, it still remains his duty to exercise reasonable care to avoid a collision with vehicles approaching on his left. He is still bound to look to the left as well as to the right for approaching vehicles. Thus it becomes, in most cases, a question as to the negligence of the respective parties—in other words, a question of fact rather than of law.

"But the fact that the driver on the right is entitled to the right of way is a material element in ascertaining who is to blame. In my opinion, our statute is intended to apply only where the travellers or vehicles upon the intersecting streets approach the crossing so nearly at the same time and at such rate of speed that if both proceed, each without regard to the other, a collision is reasonably to be apprehended.

"If a traveller holding the servient position comes to a crossing and finds no one approaching on the cross-street within such a distance as to indicate danger of interference or collision, he is under no obligation to stop or to wait, but may proceed to use such crossing as a matter of right."

The above interpretation of this section by this Court was approved and applied by the First Divisional Court in the case of *Van Camp v. Anderson* (1928), 63 O.L.R. 257, at p. 270, and must be taken to be the law of this Province.

In view of the arguments not infrequently addressed to us in these cases, it may be well to add as a corollary to the statement above quoted that the mere fact that the traveller holding the servient position reaches the limit of the intersection first is relevant evidence, but does not by itself give him the right of way.

I am unable to find anything in the evidence which justifies the contention of the plaintiff's counsel that the defendant was travelling at such an excessive rate of speed and was so far away when the plaintiff entered upon the intersection that he was justified in proceeding, though the defendant had the right of way.

In my opinion the plaintiff and defendant were each driving without taking such care as the circumstances called for, and were each guilty of negligence contributing to the accident. The resulting damage ought, in my opinion, to be borne equally by each of them.

No discussion took place before us regarding the defendant's counterclaim, but if I am right in the view which I have expressed, the damages incurred by both the plaintiff and the defendant should be added together and divided equally between them.

The appeal should be allowed and the judgment varied as above indicated, with costs against the plaintiff and in favour of the defendant.

Appeal allowed.

[APPELLATE DIVISION.]

REX v. FONTAINE AND LACASSE.

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Feb. 25

Criminal Law—Appeal by Prisoners from Conviction—Duty of Crown Counsel—Alleged Error of Counsel for Prisoners in not Calling Witnesses at Trial—Duty of Court to Examine Proceedings—Nothing to Shew Miscarriage of Justice — Criminal Code, sec. 1014(b).

It is the duty of all Crown officers to see to it that every accused person is treated with candour and fairness; and that duty was performed in this case, where the accused appealed from their conviction for robbery, but were not represented upon the hearing of the appeal, whereat counsel for the Crown stated their case fully, clearly, and fairly.

In a civil case the error of counsel in omitting to call witnesses is no ground for setting aside a verdict or for granting any relief (*Brown v. Sheppard* (1856), 13 U.C.R. 178, and other cases); and the rule in criminal cases is the same; but the Court will not, by any rule of practice or common usage, hamper itself in its right and

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duty to determine whether "on any ground there was a miscarriage of justice" (sec. 1014(c) of the Criminal Code).
Examining the proceedings in this case, in which there was no indication that the accused were not content with the course taken at the trial by their counsel, and none that they asked to have further witnesses examined, after one witness for them had testified—and there being no affidavit before the appellate court as to what the witnesses whom they proposed to call were expected to prove—the Court *held*, that nothing was made to appear which would justify its interference.

AN appeal by the defendants from their conviction by the Police Magistrate for the City of Ottawa upon a charge of robbery.

February 12. The appeal came on for hearing before RIDDELL, MASTEN, ORDE, FISHER, and GRANT, J.J.A.

The appellants were not represented by counsel. Their reasons for appeal were presented to the Court by W. B. *Common*, for the Crown, who supported the conviction.

February 25. The judgment of the Court was read by RIDDELL, J.A.:—The two prisoners were tried before the Police Magistrate for the City of Ottawa on a charge of robbery; they were represented by counsel, and were convicted upon perfectly sufficient and satisfactory evidence, after the case had been reopened and further evidence taken at the instance of the defence counsel.

Notice of intention to apply for leave to appeal was served by the prisoners in a document, signed by them, setting out the grounds; such of these grounds as are based upon the merits we need not stay to discuss—none of them has the slightest force. But, in addition to these grounds, they set out that they at the trial were desirous of giving evidence, but were dissuaded by their counsel; and also that they instructed their counsel to call six other witnesses on their behalf, but he did not do so.

The prisoners asked the Crown to state their case before this Court; and the Crown, in the earnest desire that they should have the most perfect fairplay, directed counsel to accede to this request. Before us, Mr. *Common*, who represented the Crown, stated the case of the prisoners fully, clearly, and with perfect fairness. In this, of course, was but illustrated the well-recognised duty of all Crown officers to see to it that every accused person shall be treated with candour and fairness. This the prisoners themselves recognised in leaving the presentation of their claims to the Crown.

It is also to be said that while, since prisoners have been allowed the assistance of counsel at their trial, the saying that the Judge is counsel for the prisoner has lost much of its significance and has become largely metaphorical, still it is the undoubted

duty of the Judge to see that the prisoner on trial shall have fair-play—in the sense that he is given all the rights to which he is entitled by law—and that nothing shall occur to mar “the unfailing justice of the Crown.”

So, too, on an appeal, our powers and corresponding duties are very extensive: sec. 1014 (c) of the Criminal Code provides that we may allow an appeal if “on any ground there was a miscarriage of justice;” and I think that we are called upon to examine with great care all the proceedings to see if there is any sufficient case made of miscarriage of justice. And this I conceive to be our highest and most sacred duty.

It is quite clear that in a civil case the error of counsel in omitting to call witnesses is no ground for setting aside the verdict or for granting any relief whatever: *Brown v. Sheppard* (1856), 13 U.C.R. 178; *Young v. Moodie* (1857), 6 U.C.C.P. 244; *Hurrell v. Simpson* (1862), 22 U.C.R. 65; and it has been stated more than once in general terms that the rule in criminal cases is the same as that in civil cases. But this Court will not, by any rule of practice or any common usage, hamper itself in its right and duty to determine whether there has been a miscarriage of justice.

Examining the proceedings, it appears that witnesses were called by the Crown, and fully and skilfully cross-examined by counsel for the prisoners; it also appears that, on the magistrate reserving judgment, some days thereafter, the prisoners’ counsel asked that the case be reopened, that it was reopened, and a witness called by him was examined and cross-examined. Nowhere is there any indication that the prisoners were not content with the course taken by their counsel—nowhere is it alleged that they asked to have any other witnesses examined. We have no affidavit as to what they are expected to prove, and literally all the material upon which we can form a judgment is the bare assertion of the prisoners. It must be obvious that this is wholly insufficient to justify us in thinking that there has been a miscarriage of justice—such material might be produced in every case. It is not too much to require that something more than the bare statement of the prisoners should be furnished for our consideration before we can give any relief.

Without laying down any general rule to hamper us or any other Court in the performance of this important and delicate duty, we are of the opinion that nothing is made to appear here to justify our interference.

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Appeal dismissed.

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RE FAIR AND CITY OF TORONTO.

Feb. 25.

Arbitration and Award—Municipal Arbitrations Act, sec. 7—Motion to Extend Time for Appealing—Jurisdiction of Court—Time-limit for Appeal—Arbitration Act, secs. 3, 30—Judicature Act—Rule 176—Fraud.

An appeal to a Divisional Court of the Appellate Division from an award made under the Municipal Arbitrations Act, R.S.O. 1927, ch. 24, lies, but not unless the award is appealed from within six weeks after notice that it has been filed (sec. 7 of the Act); and the Court has no jurisdiction to give leave to appeal or to extend the time for appealing after the time has expired, even in a case where there was fraud in procuring the award.

Section 3 of the Arbitration Act, R.S.O. 1927, ch. 97, is not applicable: it is only where the Arbitration Act is consistent with the Act under which the arbitration is had that it applies; and any provision which divests the statutory right of the successful party to hold the award as conclusive is inapplicable. Nor is jurisdiction to extend the time conferred by the Judicature Act and Rules.

Review of the authorities.

In re Oliver and Scott's Arbitration (1889), 43 Ch.D. 310, distinguished.

MOTION by the Corporation of the City of Toronto, contestant, to extend the time for appealing and for leave to appeal from an award of the Official Arbitrator fixing the compensation for lands expropriated by the applicant.

February 14. The application was heard by RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

F. A. A. Campbell, for the applicant.

W. R. Smyth, K.C., for the claimants Gordon and Frank.

R. L. Kellock, for the claimant the McLaughlin estate.

The arguments of counsel and the statutes and cases cited are referred to in the judgments.

February 25. RIDDELL, J.A.:—The Official Arbitrator of the City of Toronto made his award on the 2nd November, 1929, fixing the value of a certain parcel of land under by-law No. 11792—the land being taken in expropriation by the city corporation, and the proceedings of the arbitrator being under the Municipal Arbitrations Act, R.S.O. 1927, ch. 242.

An action was brought by one of the claimants against another for a declaration as to her interest in the property. At the trial of that action the learned trial Judge stated his belief that there was fraud in the transaction—what the fraud was is not, in my view, material here, nor is the question as to how it affected the arbitration of any significance. Without in any way expressing

agreement or disagreement with the opinion of that learned Judge, I shall, for the purpose of this judgment, take it for granted that in and about the arbitration there was fraud which had the effect of producing a decision that was unjust and not in accordance with real fact.

The application now before us is for leave to appeal, and the application is opposed *in initio* as prohibited by statute.

The Municipal Arbitrations Act, R.S.O. 1927, ch. 242, by sec. 7, provides as follows:—

“7. The award may be appealed against to a divisional court in the same manner as the decision of a judge of the Supreme Court sitting in Court is appealed from, and subject to section 351 of the Municipal Act, shall be binding and conclusive upon all parties to the reference unless appealed from within six weeks after notice that it has been filed.”

Admittedly the section of the Municipal Act mentioned has no bearing upon the present case; and we may read sec. 7 as if there were no such exception. The result is that there is a statutory declaration that the award is binding and conclusive upon all parties unless appealed against within six weeks after notice that it has been filed; and admittedly notice that the award was filed was given more than six weeks before any intention to appeal was expressed. There is nothing in the statute making an exception in cases of fraud; and the legislative provision is perfectly plain and unambiguous. Consequently, in view of the very large powers of the Legislature, as decided in such cases as *Florence Mining Co. Ltd. v. Cobalt Lake Mining Co. Ltd.* (1909), 18 O.L.R. 275, (1910) 102 L.T.R. 375, 43 O.L.R. 474, *Smith v. City of London* (1909), 20 O.L.R. 133, and similar cases, there is no doubt of the absolute right in law of the claimants to hold the award. As against this conclusion, the applicant cites the provisions of the Arbitration Act, R.S.O. 1927, ch. 97, sec. 3, which reads as follows:—

“3. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act.”

But, without invoking the learning as to general and special statutes, the language of this section is itself sufficient; it is only when the Arbitration Act is consistent with the Act under which the arbitration is had that it applies; and any provision inconsistent with the Act above mentioned as that under which the

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present award was made is not applicable to this arbitration and award. Consequently any provision in the general Arbitration Act which divests the claimants of their statutory right to hold the award as conclusive is inapplicable to the present case.

So, too, sec. 30 of the Arbitration Act is inapplicable, so far as it might affect this statutory right.

Then the somewhat declamatory language of Lord Chief Baron Pollock in *Rogers v. Hadley* (1861 and 1863), 32 L.J.N.S. Ex. 241, at p. 248, is quoted:—

“I consider that by the law of England fraud cuts down everything. I believe that is the common mode of expressing a legal proposition known to every lawyer in Westminster Hall. The law sets itself against fraud to the extent of breaking through almost every rule, sacrificing every maxim, getting rid of every ground of opposition which may be presented, so as to prevent it from succeeding. So much does the law of England abhor fraud that even the maxim that you can never aver against the record is not allowed to prevail if fraud can be shewn; and probably there is no maxim more stringent than that you cannot aver against the record. The law will not allow technical difficulties of any kind to interfere to prevent the success of right and justice and truth.”

We, of course, thoroughly agree with this statement of the law; but it is far from saying that any court can take away from the party to an arbitration a right vested in him by statute—even though this award was obtained in the first instance by fraud.

Equally inapplicable is the case of *In re Oliver and Scott's Arbitration* (1889), 43 Ch.D. 310. There Kekewich, J., said (p. 313):—

“I shall certainly not hold that this Act of Parliament, which limits the time, could be altered otherwise than by the authority which made the enactment, that is to say, by the Legislature itself. The Act of Parliament says that any motion to set aside an award must be made in a certain Court, and must be made in the term next after the award has been made and published to the parties; and that applies to this particular award made under that Act. Unless I can find that that has been altered by Act of Parliament I should have no hesitation in saying, on this part of the case, that the Court has no jurisdiction to set aside the award, the term next after the publication of the award having, as admitted on all hands, expired.”

But he found that Parliament had altered the time, and consequently he allowed the motion.

In the present case, I adopt the language I have quoted, and say that "I shall certainly not hold that this Act of Parliament, which limits the time, could be altered otherwise than by the authority which made the enactment, that is to say, by the Legislature itself;" and, as I can find no alteration by the Legislature, I hold that the limitation is effective. The motion, not being made within the time limited by the statute, must be dismissed and with costs.

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MASTEN, J.A.:—Motion to extend the time for appealing from an award made by the Official Arbitrator under the Municipal Arbitrations Act, R.S.O. 1927, ch. 242. Counsel for the claimants Gordon and Frank, respondents, took the preliminary objection that the Court had no jurisdiction to extend the time.

It is admitted that the award was made more than six weeks before this application was launched.

Section 7 of the Municipal Arbitrations Act provides as follows:—

"7. The award may be appealed against to a divisional court in the same manner as a decision of a judge of the Supreme Court sitting in Court is appealed from, and subject to sec. 351 of the Municipal Act, shall be binding and conclusive upon all parties to the reference unless appealed from within six weeks after notice that it has been filed."

The Act contains no provision empowering the Court to extend beyond six weeks the time within which an appeal may be brought.

That being so, the general rule applies. No appeal lies unless expressly given. The only appeal given is conditioned on its being brought within six weeks after notice that the award has been filed, and no authority is by this Act given to the Court to extend the time for appealing. Therefore, unless the power to extend the time in such a case is elsewhere conferred on the Court, there is no jurisdiction to extend the time as asked.

As was said by Meredith, C.J., in *Atkinson v. Dominion of Canada Guarantee and Accident Co.* (1908), 16 O.L.R. 619, 632:—

"Authority is not needed for the proposition that where the time is fixed by statute and the statute confers no power on the Court to extend it, the rules as to enlarging time can have no application."

See also the judgment of Wilson, C.J., in *McLean v. Pinkerton* (1882), 7 A.R. 490, and cases there cited, and *McCarron v. Metropolitan Life Insurance Co.* (1899), 35 Can.L.J. 421.

Counsel for the applicant, however, relies on the provisions of the Arbitration Act, R.S.O. 1927, ch. 97, and secondly on the

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1930. *Arbitration*, 43 Ch.D. 310.

I deal with these two points in the above order.

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The provisions of the Arbitration Act relied on by the applicant are as follows:—

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“3. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act.”

Section 16 provides for an appeal from an award made in pursuance of a voluntary submission. The notice of appeal is to be served within 14 days from service of a copy of the award and notice of filing. Subsection 10 of sec. 16 is as follows:—

“10. The Court may extend the time limited by this section either before or after its expiry or may dispense with compliance with the requirements of this section.”

Subsections 1 and 2 of sec. 30 read as follows:—

“(1) Unless by leave of the Court or a judge, an application to set aside an award, otherwise than by way of appeal, shall not be made after six weeks from the publication of the award.

“(2) Such leave may be granted before or after the expiration of the six weeks.”

A provision like sec. 7 quoted above, which makes the award binding and conclusive upon all parties unless appealed from within six weeks, is inconsistent with a provision that an award shall be binding and conclusive only if not appealed against within such time as the Court may permit.

By sec. 3, the Arbitration Act supplements the Municipal Arbitrations Act only so far as the provisions of the former are not inconsistent with those of the latter Act. The result is that the Arbitration Act does not operate to confer jurisdiction on the Court to extend the time for appealing or for moving to set aside the award.

Then is jurisdiction to extend the time conferred by the Judicature Act and Rules? Rule 176 is as follows:—

“176. The Court may from time to time enlarge or abridge the time prescribed by the Rules, or by an order, for doing any act or taking any proceeding, and this power may be exercised although the application is not made until after the expiration of the time prescribed.”

That rule might well be invoked if the proceeding was in the Court, but what the applicant seeks to do is not to enlarge or

abridge the time prescribed by the *Rules*, or by an order, for doing an act, because the time is prescribed by a statute, and the Rule itself must be taken to relate to a proceeding in the Court and not to an application to extend the time for bringing into the Court an award which the statute has declared to be final and binding.

The rule cannot apply to this case any more than to an application to extend the time for filing a chattel mortgage (*McLean v. Pinkerton*, 7 A.R. 490) nor to extend the limit of time under the Statute of Limitations (*Morris v. Richards* (1881), 45 L.T.R. 210).

The case of *In re Oliver and Scott's Arbitration*, 43 Ch.D. 310, has no application, for it was decided upon the English Judicature Rules, Order LXIV., Rules 14 and 17.

Rule 14 provides that "An application to set aside an award may be made at any time before the last day of the sittings next after such an award has been made and published to the parties;" and Rule 17 gives the Court or a Judge "power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require."

Rule 14 was held to have superseded the Act of William III. and to have brought the whole subject into the ambit of the Court's jurisdiction.

But no such rule as Rule 14, quoted above, is to be found in our Consolidated Rules of Practice.

For these reasons, I am of opinion that the Court has no jurisdiction to extend the time either for appealing or for moving against the award and that the preliminary objection is entitled to prevail.

The motion must be dismissed with costs.

ORDE, J.A., agreed with MASTEN, J.A.

FISHER, J.A., agreed with RIDDELL, J.A.

Motion dismissed with costs.

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Bankruptcy—Jurisdiction of Registrar—Adjudication upon Claim of Trustee to Proceeds of Goods Sold—Declaratory Order—Appeal—Objection to Jurisdiction—Absence of Consent of Litigants—Passive Acquiescence—Collection of Money by Summary Proceeding not Competent.

A summary motion was made by the trustee of a bankrupt's estate for an order declaring that he was entitled, as against two claimants, to the proceeds of the sale of certain goods. The motion was made returnable before the Judge in Bankruptcy; but the Registrar, assuming that he had the jurisdiction of a Judge in Bankruptcy, without any authority from a Judge and without the consent of the parties, assumed to hear and determine the application, and made a declaratory order:—

Held, following *Re Stuart & Sutterby* (1930), *ante* 154, that the Registrar had not the jurisdiction which he assumed to exercise.

Held, also, that there was no such consent or acquiescence of the claimants in the assertion of jurisdiction by an officer of the Court as precluded them from taking objection to the jurisdiction, and that they properly did so by an appeal.

The cases in which the Court has refused to entertain an appeal are based upon the consent of the litigants to the determination of their rights outside the ordinary course of the Court: *Attorney-General of Nova Scotia v. Gregory* (1886), 11 App. Cas. 229; *Canadian Pacific Railway Co. v. Fleming* (1893), 22 Can. S.C.R. 33; and *McInally v. Blackledge*, [1911] W.N. 102.

What the trustee really sought by the motion was to collect money said to be due to the bankrupt, and that could not be accomplished by a summary proceeding launched as this was; nor is it competent for any court to seek to acquire jurisdiction which does not otherwise exist under the guise of a declaratory decree.

An appeal by J. B. Bartram and V. T. Bartram from an order of the Registrar in Bankruptcy declaring that the trustee of the estate of a bankrupt is entitled, as against the appellants, to the sum of \$1,500, the proceeds of the sale of certain furs.

The motion was heard before MIDDLETON, J.A., sitting in Bankruptcy.

W. R. Wadsworth, K.C., for J. B. Bartram.

J. E. Tansey, for V. T. Bartram.

G. T. Walsh, K.C., and *J. N. Mulholland*, for the trustee in bankruptcy, respondent.

February 25. MIDDLETON, J.A.:—A summary motion was made returnable before the Judge in Bankruptcy, but the Registrar assumed that he had the jurisdiction of a Judge in Bankruptcy, and, without any authority from a Judge, and without

the consent of the parties, assumed to hear and to determine the application, and in the end made an order declaratory in its nature, affording the trustee no remedy.

That the Registrar had not the jurisdiction he assumed to exercise has been determined in a similar situation in *Re Stuart & Sutterby* (1930), ante 154, by my brother Wright, whose decision I follow without independent investigation.

It is suggested that the parties, having assented to the assumed jurisdiction and given evidence, cannot appeal, and have in effect constituted the Registrar an arbitrator and are bound by his decision.

Much colour is lent to this suggestion by the case of *McInally v. Blackledge*, [1911] W.N. 102. There a County Court Judge had authority to appoint as a Deputy any barrister of sufficient standing, and to direct him to hear a matter coming before him. A small matter came before the Judge, and, with the assent of the parties, he directed the Registrar, who was lacking in professional requirements, to determine the matter, and an appeal was then had from the decision of the Registrar. It was held that no appeal would lie, and that the parties were bound by the decision, having assented to having their rights determined outside of the ordinary course of the Court.

The principle governing the matter is very clearly stated by Sir Henry Strong in *Canadian Pacific Railway Co. v. Fleming* (1893), 22 Can. S.C.R. 33, at p. 36:—

“It is well settled by authority that in . . . cases where a jurisdiction beyond the ordinary jurisdiction which it has by general law is conferred upon a court of justice by an arrangement between the parties, its decision is regarded as that of a private tribunal constituted by the parties, such as a board of arbitrators, and cannot be reviewed in appeal or otherwise, as judgments pronounced in the regular course of its ordinary procedure may be reviewed and appealed from.”

That case was one in which, under the statutes of New Brunswick, all matters of fact must be decided by a jury. Upon an appeal to the New Brunswick Court, it was agreed that the appellate court should determine all questions of facts necessary to adjust the rights of the parties. This constituted that court a private tribunal, from which no appeal would lie.

The same principle is established by the case of *Attorney-General of Nova Scotia v. Gregory* (1886), 11 App. Cas. 229. There a third party was interested in litigation coming before the Supreme Court of Canada. His presence before the Court was necessary in order that justice might be done, and he agreed

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BARTRAM, to submit his rights to the decision of the Supreme Court. Dissatisfied with the result, he attempted to appeal to the Privy Council. It was held that no appeal would lie, because by this consent the Supreme Court had been constituted a private tribunal, and was not acting in its ordinary jurisdiction as a court of appeal.

There is no need of multiplying instances to illustrate the principle.

I think it will be found in every case that the refusal to entertain an appeal is based upon the consent of the litigants to the determination of their rights outside of the ordinary course of the Court.

Here, there was no such consent. There was a more or less passive acquiescence in an assertion of jurisdiction by an officer of the Court. An appeal taking objection to the jurisdiction was immediately launched, the objection being well-founded. I can find no such consent or acquiescence as precludes the objection. This is sufficient to dispose of this appeal.

Another objection was taken which appears to me to be fatal. What is really sought is to collect money which is said to be due to the bankrupt. This cannot be accomplished by a summary proceeding launched in this way. If there is an indebtedness it should be collected by the trustee in bankruptcy in the ordinary way. I think the learned Registrar became conscious of this, because he first directed payment of the money, and afterwards contented himself with making a declaratory order. I do not think that it is competent for any court to seek to acquire jurisdiction which does not otherwise exist, under the guise of a declaratory decree. See *Attorney-General v. Cameron* (1899), 26 A.R. 103; *Barraclough v. Brown*, [1897] A.C. 615.

The appeal should be allowed, and the whole proceedings should be declared to be had and taken without jurisdiction, and the trustee in bankruptcy should pay the costs throughout.

[IN CHAMBERS.]

RE INDEPENDENT ELECTRIC LTD. V. GOLDFIELDS DRUG STORE.

1930.

Feb. 25.

Division Courts—Territorial Jurisdiction—Notice Disputing Jurisdiction—Payment into Court with Notice—Whether Waiver of Objection—Division Courts Act, R.S.O. 1927, ch. 95, sec. 70—Prohibition—Transfer of Action to Proper Court.

Where an action was brought in a Division Court within the territory of which the cause of action did not arise and the defendant did not reside, it was *held*, that the defendant, by leaving with the clerk of the court, at the proper time, a notice disputing the jurisdiction (sec. 70 of the Division Courts Act), had effectively objected to the jurisdiction, and did not by paying into court with his defence and dispute-note a sum of money (not the full amount of the claim) which he admitted to be due to the plaintiff, waive his objection to the jurisdiction.

In re Jones v. James (1850), 19 L.J.Q.B. 257, applied.

An order for prohibition was made, but so framed as not to prevent a transfer of the case to the proper Division Court.

MOTION by the defendant in an action in the First Division Court of the County of York for an order prohibiting the plaintiff from taking any further proceedings in this action in that court.

February 11. The motion was heard by MIDDLETON, J.A., in Chambers.

R. I. Ferguson, for the defendant.

E. G. Black, for the plaintiff.

February 25. MIDDLETON, J.A.:—The defendant carries on business at the town of Timmins, and the cause of action did not arise entirely within the jurisdiction of the First Division Court; but, when the action came on for trial, it appearing that the defendant had, with his defence and with his notice disputing the jurisdiction of the court, paid into court \$7.58 which he admitted was owing to the plaintiff, the learned Division Court Judge held that the payment into court of the admitted amount was an implied assent to the jurisdiction, and refused to transfer the case to the Timmins court.

I am of opinion that the Division Court Judge was wrong, and that the defendant has not lost his right to object to the lack of jurisdiction.

The principle is more clearly stated by Mr. Justice Erle in the case of *In re Jones v. James* (1850), 19 L.J.Q.B. 257, than in any other case that I have found. It is there said (p. 258):—

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"Where an inferior Court has no jurisdiction from the beginning, a party by taking a step in the cause before it, does not waive his right to object to the want of jurisdiction. But jurisdiction is sometimes contingent; in such case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards."

The Division Court had jurisdiction to entertain this plaint, but the jurisdiction was contingent upon it being found that the defendant was amenable to the particular territorial jurisdiction by reason of residence or by reason of the cause of action arising within the limited territorial jurisdiction. I quite agree that if the defendant does not at the proper time exercise his right of destroying the jurisdiction he waives that right and cannot afterwards object; but I think the defendant here did exercise his right of objecting at the proper time and in the proper manner.

Section 70 of the Division Courts Act, R.S.O. 1927, ch. 95, provides that, where a defendant intends to contest the territorial jurisdiction of the court, he shall, within certain time-limits, leave with the clerk a notice in writing disputing the jurisdiction. That was done, and that secured to the defendant his right to object effectively to the jurisdiction. He is permitted to file his defence, and one mode of defence is to pay into court the amount of any indebtedness admitted, and to dispute the balance.

An order for prohibition will therefore go, but it must be so framed as not to prevent a transfer of the case to the proper Division Court.

The plaintiff, who endeavours to support the ruling of the Judge, must pay the costs of this motion.

[APPELLATE DIVISION.]

1929.

ROBERT SIMPSON CO. LTD. v. RUGGLES.

Nov. 23.

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Feb. 28.

Husband and Wife—Clothes Supplied to Wife on Credit—Whether "Necessaries"—Liability of Husband—Implication of Agency—Money Given to Wife by Husband to Buy Clothes—Credit Given to Wife alone without Knowledge of Husband.

* The defendants were husband and wife, living together. The wife went to the plaintiffs' departmental store and asked for a credit account. She signed, in her own name, a written application, in which her husband's place of business was mentioned as "business address" and the name of his firm as "business." In it she represented herself as a property-owner, and gave the names of her bankers and of merchant firms with which she had accounts. The references were "checked up," the inquiry made being as to her, not as to her husband. She was notified that an account had been opened in her

name in the plaintiffs' books. No inquiry was made as to the husband's responsibility or means, and he was not notified and did not know that the account had been opened. The wife made large purchases, during a short period of time, of wearing apparel for her personal use. The bills were rendered to her only, and he knew nothing of the account or (as he said) of the goods being supplied until after she had failed to pay, when the plaintiffs wrote to him drawing his attention to the balance of her account, amounting to more than \$1,000. The husband testified that he supplied his wife with sufficient money to pay for accounts such as this:—

Held, that a husband cannot be charged for the contract of his wife unless he has given authority to her; the authority may be given by implication that he intends the wife to take means to supply herself with necessaries, the implication being for the benefit of the wife and not of those who supply her; and it is only for what is reasonably necessary that the implied agency is—not for what the wife may see fit to order.

The wife had no express or implied authority to pledge her husband's credit; the goods supplied could not be considered necessary for a woman living with her husband; there was nothing to indicate that the amount he gave her was not sufficient for all real necessities; and credit was given by the plaintiffs to the wife alone.

Held, therefore, that the husband was not liable to the plaintiffs for the balance of the price of the goods supplied.

Review of the authorities. *Montague v. Benedict* (1825), 3 B. & C. 631, and *Callot v. Nash* (1923), 39 Times L.R. 291, specially referred to.

ACTION brought against Frank M. Ruggles and Ella R. Ruggles, his wife, to recover the sum of \$1,056.60, the purchase-price of certain articles of wearing apparel supplied by the plaintiffs upon credit to the defendant Ella R. Ruggles for her own use.

November 14 and 23, 1929. The action was tried before McEvoy, J., without a jury, at a Toronto sittings.

W. B. McPherson, for the plaintiffs.

J. R. Cartwright, for the defendant Frank M. Ruggles.

Peter White, K.C., for the defendant Ella R. Ruggles.

November 23, 1929. McEvoy, J. (at the conclusion of the hearing):—This is an action brought by the Robert Simpson Company Ltd. to collect a store-bill. The goods were bought by Ella R. Ruggles, the wife of Frank M. Ruggles, and they were received by Mrs. Ruggles, as she swears in her examination for discovery, which has been read. If the wife had any right to get the goods and charge them in the way that would make her husband liable, her evidence that she received the goods is quite sufficient evidence of the goods having been bought and delivered. I have no doubt that the goods were bought and delivered. The evidence leaves no doubt in my mind that at the time this indebtedness was being incurred Mr. Ruggles had, as his counsel put it, ample money, not only from his income from the Ruggles

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Mr. Ruggles was living at No. 7 Castle Frank-road, in a very pretentious way, driving a big car, buying properties, and conducting himself in the manner of a wealthy man, and I have no doubt he expected his wife to conduct herself in the manner of a wealthy man's wife, and that she was conducting herself in that manner. I think she was conducting herself in that way with the approval of Mr. Ruggles; and I think Mr. Ruggles was just as desirous that his wife should be well dressed and make an appearance in keeping with the sort of life he was proposing to lead and was leading openly. If it were not for that I would not think of holding him responsible for this large bill of \$1,000, contracted in three months' time, for the kind of articles that are charged in this account; it would have been difficult for me to find that this was a reasonable bill if it were not for that which I have just stated.

Looking at it from the merchant's point of view, it was a reasonable bill to allow Mrs. Ruggles to run, because Mr. Ruggles has sworn that he was giving his wife money—in one place he says \$250 a month—to take care of this kind of thing. This would mean that in his view it was a reasonable amount. But he went farther than that and said that during the very time this particular indebtedness was being incurred he actually gave his wife \$1,000 for this very purpose, to be spent in this very way.

Now, if Mr. Ruggles thought that \$1,000, with his way of living during that time, was a reasonable amount to give to his wife for that purpose, and he gave it to her, as he says, then I think it would be unreasonable for me to hold that the Simpson company were not acting reasonably in advancing to his wife an amount not in excess of what he himself says was paid to her as a fair and proper amount to advance. If he had not said that he had advanced that amount of money for the purpose of buying the very kind of articles charged for in this account during the very time the bill was being charged, I should have a very great difficulty in this case in saying that the goods were necessities for her in her station of life.

I think that the indebtedness was honestly incurred. The evidence is not very satisfactory, but I have not any doubt in my mind that Mr. Ruggles knew that it was being incurred, and he must have known that his wife would not have got all these articles that are enumerated here unless he had been advancing large amounts, as they were living together in a friendly way, and living on the usual terms of man and wife, at that time,

according to the evidence. He must have known that some of these goods were coming into the house, and he might have thought, as he was giving her these sums of money, that she was paying cash for them, and in that way he might not be impressed with it.

The first point I must decide is, whether these goods were necessities for this wife in the station of life in which she and her husband were living at the time. Upon his own evidence, I think, Mr. Ruggles has made it clear that he thought that amount of money, for the purpose for which this account was run, was a reasonable amount—an amount, at any rate, that he was content his wife should spend for that purpose.

Therefore, and largely for that reason, I hold that this is an account for necessities for which he ought to pay.

It may be that he advanced some moneys to his wife during the incurring of this indebtedness, but I do not think he advanced any such sum of money as he indicated in the box. When he was in the box, he thought that about \$500, roughly, had been paid during the time this account was running, by his firm—by Mr. Hall or somebody else in the office—either in money or by cheque. I am not so much impressed with the idea that it would be necessarily a cheque, but I am impressed with the thought that there was no such sum of money paid out to the wife through the office during the time this account was running. I do not think he paid her any such sum as he said he did while this account was running, for the purpose he said he did; that is my impression of it.

I do not think the Simpson company can be said to have been careless or indifferent as to whether Mrs. Ruggles was charging bigger bills than a woman in her station should charge, and then expect her husband to pay.

I think, therefore, if there had not been trouble between the husband and wife, Mr. Ruggles would have paid this bill and never said one word about it; the quarrel between the husband and wife has put him in a temper where he naturally says, "I am not going to pay this bill unless I have to."

While I feel some compunction in holding him liable to pay this account, yet, under all the circumstances, and because he may have some considerable ground for feeling that way about it, I am not able to find that I should say to the Simpson company, "You have to give these goods to this man, or to his wife."

I do not know why the wife is not here. The way the pleadings are drawn it would appear as though the intention was to collect from the husband; although there is the alternative claim

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upon the wife, the wife is not here. Whether she is relying upon the likelihood of there being difficulty in proving delivery of the goods if she were not here, I do not know, but from the way the case was presented at one stage by counsel it would appear as though she sought to put the case in the position that the wife was the agent for the husband, and the Simpson company have no right to recover against the wife, and the husband is not liable because it is an extravagant bill and ought not to be paid. I am not giving any effect to that at all; this man and his wife got these goods and were using them for the purpose of making their position, in a business and social way, what they desired it should be.

There will be judgment for the plaintiff against the husband for the amount of the bill, with costs.

I think the action against Mrs. Ruggles ought to be dismissed without costs.

The defendant Frank M. Ruggles appealed from the judgment of McEvoy, J.

February 24, 1930. The appeal was heard by RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

R. H. Greer, K.C., and *J. R. Cartwright*, for the appellant. The learned trial Judge erred in holding that the goods purchased by the wife were necessities for which her husband was liable. The purchases were made by the wife without the knowledge of her husband. Credit was given to her alone by the plaintiffs. The account was opened in the name of the wife. The reference-card in connection therewith refers to property which was actually in the wife's name and to her bank-account, which was then in existence. No information was required or furnished regarding the financial position of the husband. No bill was rendered to the husband until three months after the account was closed. It was immediately repudiated by him. In any event the evidence shews that the husband gave to his wife during the period in question sufficient money to purchase necessities.

W. B. McPherson, for the plaintiffs, respondents. The fact that the account was carried in the name of the wife in accordance with their usual custom corroborates the plaintiffs' testimony that credit was given to her as the wife of the defendant and that it was always the intention to look to him for payment. The evidence of the husband that he gave his wife \$1,000 during the period in question for the purpose of purchasing goods of the character of those furnished, even though not believed by the learned trial Judge, shews, at least, that the husband considered

the expenditure of such an amount reasonable and necessary. Therefore, the learned trial Judge was right in his finding that the goods supplied were necessities according to the station in life and the financial position at that time of the husband: *Miss Gray Ltd. v. Cathcart* (1922), 38 Times L.R. 562; *Scott v. Allen* (1912), 26 O.L.R. 571; C.E.D. (Ont.), vol. 5, p. 677.

Greer, K.C., in reply, referred to *Jolly v. Rees* (1864), 15 C.B.N.S. 628; *Debenham v. Mellon* (1880), 6 App. Cas. 24, at p. 36; *Reneaux v. Teakle* (1853), 8 Ex. 680; *Remington v. Broadwood* (1902), 18 Times L.R. 270.

February 28. RIDDELL, J.A.:—This is an action brought by the Robert Simpson Company against a husband and wife for the price of wearing apparel said to have been supplied to the wife. At the trial without a jury before Mr. Justice McEvoy, all parties were represented by counsel; the wife did not appear, but no adjournment of the trial was asked for or had for that reason—in the result, judgment was given dismissing the action against the wife and in favour of the plaintiffs against the husband—he now appeals, and the plaintiffs do not appeal from the dismissal as against the wife.

The appeal might be disposed of on the simple ground that there is no evidence that the goods were ever supplied; this alleged fact was, indeed, proved as against the wife by her examination for discovery, but that is evidence only as against her and not against the husband: Rule 330; as against him, the statements made by his wife are mere hearsay. It seems necessary to mention this elementary principle, as the judgment proceeds in part upon the evidence of the wife.

But it would be wholly unsatisfactory to dispose of the case upon such a ground, as I take it for granted that the evidence could be supplied without difficulty, and it would probably be considered a matter of costs only, and permission would be given to adduce the missing evidence.

On the merits, I have some difficulty in following the learned trial Judge both in his findings of fact and his view of the law.

The evidence shews that, husband and wife living together, the wife went to the plaintiffs' establishment and asked for a credit account—the application was "taken by an application clerk," from the lady in person, and "in writing" signed by her—this application is produced; and, while what is apparently her husband's place of business is mentioned as "business address," and apparently the name of his firm is given as "business," the application is signed by her in her own name, and she represents herself as a property-owner; she also gives the names of her banks

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and of three merchant firms with whom she had accounts. This application was passed on to the credit manager, and he gave instructions to "check up the references" which she had given "and get the information satisfactory on which to pass the credit." Letters were written to the banks and merchants concerning her and saying, "In applying to us for a charge-account, Mrs. Frank M. Ruggles, 17 Castle Frank-drive, Toronto, has given your name as a reference," and asking for information with regard to "the financial standing of the above." The replies were concerning her, and in one case where the party applied to had no information concerning her, it was said that her husband could "be considered a good risk for reasonable amount." Throughout, the inquiry is as to her, not as to him. This information was transmitted to the credit manager, and, as the result, "Mrs. Ruggles was notified that the account had been opened on the books." No inquiry was made as to the husband's responsibility or means, and he was not notified of the opening of the account; the credit manager swears that the account was opened in the name of the wife and not of her husband. The husband knew nothing of the account being opened, and the learned trial Judge in his reasons for judgment, referring to the somewhat large sums of money the husband swore he gave his wife for dress, says:—

"He must have known that some of these goods were coming into the house, and he might have thought, as he was giving her these sums of money, that she was paying cash for them. . . ."

From the 18th March to the 25th June, 1928, the wife was supplied with 9 dresses (not counting 1 dress returned), 2 gowns, 3 suits, and a riding habit; also 14 pairs of hose, 3 pairs of shoes, 1 of slippers and 1 of pumps, not to speak of handkerchiefs, gauntlets, gloves, etc., on a liberal scale.

The account being opened and conducted in her name, the bills were rendered to her, not to the husband, and he knew nothing about the account or (as he says) of the goods being supplied until after she had omitted to pay; and then, on the 5th September, he was written to and his attention drawn to "the balance of Mrs. Ruggles' account amounting to \$1,056."

He did not pay, nor did she; and the company sued both, with the result already stated, that she escaped and the husband was saddled with the account—it is no great wonder that he appealed.

His story is that he having an income from his firm in 1928 of some \$500 a month with some private means, his wife ran some accounts which he knew nothing of, and that, becoming aware of them, he agreed to pay them on condition that there were to be no more charge-accounts; that he had supplied his wife with

sufficient money to pay all accounts such as this, and that he had never seen any of the goods supplied or any parcel from Simpson's in the house—he did not know that his wife was dealing with Simpson's and he supposed Simpson's was a cash firm.

As to the money said by the husband to have been paid by him to his wife, the learned trial Judge does not think that he paid so much as he says he did for the purpose he says he did; but that he did pay her sums of money is taken as a fact upon which the judgment is in part based—as has been stated above. There is no finding that the amounts paid to the wife for the purpose were not ample to pay for anything which could be considered reasonably necessary for her; and, on this evidence, I think we should find that the husband did supply the wife with sufficient money for the necessities to which the law entitles her.

It seems to me that the learned trial Judge has misconceived the law in such cases. This law is quite settled and in substance is as old as old Fitzherbert who, F.N.B.G. 120, says:—"A man shall be charged in debt for the contract of . . . his wife, if he giveth his authority to his wife; otherwise not." See Eversley, *Domestic Relations*, 4th ed., p. 289. The authority, as in all other agencies, may be express by language, by estoppel by conduct, or implied. There is no question here of agency express or by estoppel; and the only method that can be suggested is by implication.

This implication derives from the times when the wife had no money of her own, everything was the husband's—as the common saying runs, the husband and wife were one, and the husband was that one. The duty was impressed upon him in that state of affairs to support his wife, to supply her with necessities, or as Bayley, J., puts it in *Montague v. Benedict* (1825), 3 B. & C. 631, at p. 635, "what is strictly necessary for her . . . support." See Eversley, *ut supra*. This being the duty of a husband, in case he omits so to do, there is an implication that the husband intends the wife to take means to supply herself with such necessities; and, consequently, he is considered to authorise her to pledge his credit to the extent required for such supply. This implication of law is for the benefit of the wife and not of those who supply her; the view of the supplier as to the reasonableness of what the wife orders is *nihil ad rem*; and I am unable to follow the learned trial Judge in his discussion of the view of the plaintiffs here. We have no concern whatever with the plaintiffs' conception of the reasonableness of the demands of the wife, but only with whether she was the agent of her husband in these transactions. As Eversley well puts the law:—

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"The husband's liability may arise . . . in respect of necessities only, from his improper refusal or neglect to supply her with necessities:" *op. cit.* at p. 290—and this is not affected by the good faith or reasonableness of the persons claiming. "This authority on the part of the wife to pledge her husband's credit . . . must be based upon some substantial conduct of the husband . . . impliedly consenting to be bound."

That cohabitation alone does not raise the presumption of agency has long been decided by such cases as *Jolly v. Rees*, 15 C.B.N.S. 628; *Debenham v. Mellon*, 6 App. Cas. 24—and that such authority cannot arise by implication if he supplies her with the means to procure her necessities elsewhere is expressly laid down in the last-named case at p. 37.

Then, too, it is to be remembered that it is only for what is reasonably necessary that the implied agency is given—not for what the wife may see fit to order.

I think, then, that the judgment appealed from is wrong for more reasons than one. In the first place, it would be alarming and, as I think, absurd, to hold that the great quantity already mentioned of gowns and other wearing apparel could possibly by any stretch of language be considered as necessary for any woman living with her husband and not making her living by exhibition of clothes.

Then, even if it were to be considered that these were, in a sense, necessities, it is clear that the husband was supplying his wife with money to pay for such things; and there is nothing to indicate that the amount he paid was not sufficient for all real necessities, though he may be in error as to the amount he did pay her. Again, it seems quite clear that credit was asked for and given to the wife alone.

I think that the appeal must be allowed and the action against this defendant dismissed with costs here and below.

I have thought that the reasons should be set out in full although the law is text-book law about which there can be no doubt, by reason of what seemed to me to be serious misconceptions on the part of the learned trial Judge. The following and other cases have been consulted to see if what we considered well-established law had been altered or questioned—*Miss Gray Ltd. v. Cathart*, 38 Times L.R. 562; *Scott v. Allen*, 26 O.L.R. 571; *Reneaux v. Teakle*, 8 Ex. 680; *Remington v. Broadwood*, 18 Times L.R. 270; *Morel Brothers & Co. Ltd. v. Earl of Westmorland*, [1903] 1 K.B. 64, 19 Times L.R. 43; *Callot v. Nash* (1923), 39 Times L.R. 291; Leake on Contracts; Eversley on Domestic Relations, etc.

MASTEN, J.A.:—Appeal by the defendant F. M. Ruggles from the judgment of McEvoy, J., dated the 23rd November, 1929, in favour of the plaintiffs for \$1,056.50 for goods sold to the appellant's wife. As against the wife the action was dismissed, and no appeal has been taken by the plaintiff from that dismissal.

During a period from the 18th March to the 25th June, 1928, the defendant Ella R. Ruggles purchased, from the plaintiff company, dresses, shoes, stockings, and other personal clothing, and during that period there was paid on account of such purchases, on the 22nd March, a sum of \$110. Otherwise no payment was made.

During this period the defendant Ella R. Ruggles was living in the city of Toronto with her husband, Frank M. Ruggles. Unhappy differences having since arisen between these defendants, the husband-defendant declines to pay the balance due to the plaintiffs for his wife's purchases.

The learned trial Judge was of the opinion that the goods purchased were necessities for the wife in the situation of life in which she and her husband were living at the time, and that because the husband asserted in his evidence that he had been making to his wife an allowance of \$250 a month, for this very purpose, thereby there was established the fact that he desired her to dress in the style called for by the purchases in question, and that therefore they were necessities, and largely for that reason he held that the husband was liable.

I am unable to concur in the view so expressed in the Court below.

A consideration of the evidence which was adduced at the trial convinces me that the wife had no express or implied authority to pledge her husband's credit; that the articles supplied were extravagances and were not necessities; and that the plaintiffs gave credit to the wife and not to the husband.

The law on the subject is well settled, and I only refer to the recent case of *Callot v. Nash*, 39 Times L.R. 291, where the facts and circumstances are not very dissimilar from those existing in the present case.

For these reasons I would allow the appeal and dismiss the action with costs against the respondents.

FISHER, J.A.:—The plaintiffs sue the defendant and his wife for goods supplied between the 18th March, 1928, and the 25th June, 1928. The wife did not appear at the trial and the action was dismissed as against her and judgment entered against the appellant for the sum of \$1,056.60. The plaintiffs claim that the

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goods supplied were necessities, and therefore the husband-defendant must pay.

It appears that on the 19th March, 1928, the wife made written application for the opening of a charge-account with the plaintiff company. In the application the wife declared that she was the owner of a residence, 7 Castle Frank-road, Toronto, and had a bank-account in a branch of the Royal Bank. The application, which was signed by the wife, concludes with the following sentence: "I hereby make application for a charge-account with the Robert Simpson Company Limited, subject to their terms of settlement in full by the 10th of month following purchase." The evidence is that the plaintiffs made some inquiries and then gave the wife an approximate limit of credit of \$300.

At the time the goods were purchased, the defendants were living together as man and wife, and at the time this action was commenced they were living separate and apart.

It is admitted that the plaintiffs never rendered an account to the husband for any of the items sued for, and the first notification the plaintiffs gave the husband was in a letter dated the 5th September, 1928, demanding payment of the account, and the appellant states that he knew nothing about the transactions until he received that letter. There is no evidence that the husband knew anything about the charge-account, but there is some evidence that the husband during this purchasing period gave his wife considerable spending money.

The learned trial Judge supported his judgment on the following grounds: that the husband at the time this account was incurred had ample money to pay it, not only from his income but from his business; that he was living in a very pretentious way, driving a big car, and conducting himself in the manner of a wealthy man, and that he expected his wife to conduct herself in the manner of a wealthy man's wife; that it was a reasonable bill to allow the wife to run, because the husband had sworn he was giving his wife \$250 per month to take care of this kind of thing; that the plaintiffs had acted reasonably and not carelessly in selling their goods to the wife, and that the goods supplied were necessities, considering the station of life in which the husband and wife were living.

With respect, I am of opinion that the judgment cannot be supported on any of those grounds or on any other ground. The "charge-account" was opened with the wife alone after the plaintiffs had secured the wife's signature to the application, and were satisfied with her statements that she was the owner of a residence in Castle Frank-road, had a bank-account, and was the wife of a

mining broker, and it was to her that they extended the credit and that they expected her to pay. This conclusion is strengthened by the fact that the plaintiffs did not render any account to or notify the husband of any of the purchases until the month of September. It is to be observed that the application provides that the *wife must comply with the plaintiffs' terms of settlement as to payment to be made in full the following month*, clearly indicating to my mind that the wife was the one to whom the plaintiffs looked for payment, and it will also be noted that, according to the evidence, they limited the credit at the time the charge-account was opened to the sum of \$300.

I do not think it ever entered into the minds of those who negotiated with the wife when the account was opened that they might hold the husband liable because of the fact that the purchases to be subsequently made were "necessities." I think that was a matter which arose only after the plaintiffs found what kind of a woman they had been dealing with.

It appears to me that the plaintiffs were satisfied to extend credit to the wife simply because she lived and owned a house in what is termed a fashionable district, was the wife of a broker, and had her own banking account. To hold that a husband is liable if the wife does not pay, simply because the purchases were made by a wife and therefore of necessity must be "necessaries," would be to impose on a husband a liability that it was never intended he should assume. Apparently the plaintiffs kept no check whatever on the purchases made by the wife, as we find that during the period, about two and a half months, the company sold her—amongst other articles—16 dresses, including a riding habit, 12 pairs of hose, and 6 pairs of boots, one pair costing about \$23. One would have thought that these unusual purchases, in so short a period, would have attracted the special attention of the company and raised some doubt as to whether the articles purchased were in fact necessities and chargeable to the husband and have caused them to take the matter up with the husband.

I think the present difficulty to some extent has arisen in consequence of large departmental and other shops encouraging customers to open what is now commonly known as a "general charge-account." These accounts are, no doubt, a great convenience and comfort to the customer as well as of benefit to the merchant in retaining the customer, and, as long as the credit lasts, an added incentive to make purchases, but merchants opening these accounts—and especially with married women—should understand that, without some safeguard, there is considerable risk because there will be nothing to prevent the same wife opening—say as many as

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a half-dozen of these accounts—with other shops, and then proceed, as the wife in this case did, on a saturnalia of purchasing goods of one kind or another, to the value of thousands of dollars, and at that very time it may be that the husband was making his wife a comfortable spending allowance to take care of her necessities.

It may be quite true that some married women would resent being asked to get their husband's written consent to a "charge-account," and that some husbands would resent any merchant notifying them about their wives' charge-accounts, but business delicacy might lead to business loss, and, unless something of this kind is resorted to, the merchant must assume the risk if the husband disputes liability.

It seems to me idle to argue that, simply because a man lives in a certain section of the city, drives an automobile, and is engaged in a brokerage business or any other kind of business, that licenses a merchant to sell to a married woman anything she may wish to purchase and the husband must pay.

I think the law applicable to the facts in the present case is to be found in *Montague v. Benedict*, 3 B. & C. at p. 637, wherein Holroyd, J., stated:—

"Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril; and if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge. Where a tradesman provides articles for a person whom he knows to be a married woman, it is his duty, if he wishes to make the husband responsible, to inquire whether she has her husband's authority or not; for where he chooses to trust her, in the expectation that she will pay, he must take the consequences if she does not. If it turn out that she did act under the authority of her husband, when she gave the orders, he will be liable, but otherwise he will not. If we were to hold that he would, no man in any case would be safe, if the wife chose to say that she had the authority of her husband."

Supposing, for example, that a husband is in receipt of a salary of say ten or twelve thousand per year, and has no other source of income, and that the whole of his salary is being absorbed in living expenses, is the husband to be held liable simply because the wife enters into a contract with a merchant, without her husband's consent, for goods supplied upon the supposition or pretence that they are necessities? If so, it would be in the power of the wife to ruin her husband financially.

The onus of proving that the articles sold were in fact necessities rests on the plaintiff company and they have not satisfied that onus. It is quite possible that the wife had, for all the Court knows, at the time these purchases were made—even for a woman of her apparent social standing—an abundance of the very articles she purchased during these two and a half months, and, if she had, why should the husband again be called upon to pay?

In support of my conclusions I do not think it necessary to go through the long line of cases establishing the principle on which the authority of a wife to pledge the credit of her husband rests, but reference may be had to *Miss Gray Ltd. v. Cathcart*, 38 Times L.R. 562, *Callot v. Nash*, 39 Times L.R. 291, and *Debenham v. Mellon*, 6 App. Cas. 21.

In this case I find that the contract was made with the wife and it was she to whom the plaintiffs extended credit and looked for payment; that the plaintiffs have not satisfied the onus of shewing that the goods purchased were necessities; that the husband had no knowledge whatever of the charge-account having been opened with the plaintiffs, or that they were supplying her with these goods; and that the husband had, during the period these were purchased, furnished his wife with sufficient money to pay for such necessities as she was entitled to purchase.

The appeal will be allowed and the action against the defendant husband dismissed with costs here and below.

ORDE, J.A., agreed in the result.

Appeal allowed.

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[APPELLATE DIVISION.]

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Feb. 28.

Municipal Corporations—Agreement between City Corporation and Street Railway Company—Prevention of Competition—By-law of City—Conviction for Breach of—Sight-seeing 'Bus Carrying Passengers—Exception in By-law—Whether Competing Company within—Route of Vehicle.

On the 25th January, 1924, an agreement was made between the Corporation of the City of Ottawa and the Ottawa Electric Railway Company, and was confirmed and validated by 14 Geo. V. ch. 143 (Ont.) and by 14 & 15 Geo. V. ch. 84 (Dom.) The agreement provided, *inter alia*, for the operation by the railway company of passenger motor-busses over the city's streets; that (clause 1(d)) the words "transportation system" in the agreement should mean any system for the operation of electric cars and motor-busses, but should not include vehicles chartered for special trips, such as cabs and taxicabs; that (clause 8(a)) the railway company should have

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an exclusive franchise during the term of the agreement to construct, maintain and operate within the limits of the city a transportation system, the company not to be subject to competition in the business of transporting passengers, whether by motor-busses or otherwise; that (clause 8(c)) the railway company will not object to the operation, within the limits of the city, of motor-busses running between any point within one-quarter mile of the city-hall and towns and villages outside the limits, but no such motor-bus shall convey passengers from one point within the city limits to another point therein. A by-law was passed by the city council on the 6th August, 1924, reciting the provisions of clauses 8 (a) and (c) of the agreement and practically repeating them in the enacting part of the by-law; clause 3 of the by-law corresponding with clause 8 (c) of the agreement. The defendant company was convicted by a police magistrate for that it did on the 26th July, 1929, unlawfully compete with the railway company, within the city limits, in its business of transporting passengers for hire, contrary to the by-law. On the day mentioned the defendant company operated a sight-seeing motor-bus from a hotel in the city, within a quarter of a mile from the city-hall, through the city streets into the neighboring townships, through an incorporated village, into the Province of Quebec, and then by another bridge to the city and back to the hotel. The passengers all embarked at the hotel, and each paid a fare of \$1 for the round trip. The 'bus did not stop to take on or put off passengers from the time it left the hotel till it returned to it. The railway company operated a sight-seeing 'bus from the same hotel which followed the same route and charged the same fare:—

Held, that, upon the proper construction of the by-law and agreement, the defendant company was competing with the railway company.

2. That the defendant company's 'bus was not chartered for a special trip.
3. That the trip described came within clause 3 of the by-law and was therefore lawful.

The conviction was quashed.

AN appeal by the defendant company from its conviction by the Police Magistrate for the City of Ottawa for breach of a by-law of the city. The appeal was upon a case stated by the magistrate. See *Rex v. Red Line Ltd.* (1930), *ante* 11.

February 10. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

R. H. Parmenter, K.C., for the appellant company, contended that it was not competing with the Ottawa Electric Railway Company in its business of transporting passengers for hire, contrary to the provisions of by-law 5806 of the City of Ottawa. The fare charged by the appellant company was \$1 per trip, whereas the railway company charged a fare of only 7 cents per trip. By an agreement entered into between the Corporation of the City of Ottawa and the railway company in 1924 (see the Ontario Act (1924) 14 Geo. V. ch. 143, and the Dominion Act (1924) 14 & 15 Geo. V. ch. 84) the railway company was granted a franchise (clause 8(a)) to operate a transportation system within the limits

of the City of Ottawa. The appellant company was carrying on an interurban service, and this is entirely without the ambit of the franchise. The appellant company was not "transporting" passengers. It was not conveying passengers from one point within the city limits to another point therein. It merely takes passengers from one point within the city and brings them back to the same point. The business being carried on by the appellant company comes within the exception of clause 1(d) of the agreement, which states that "a transportation system shall not include vehicles chartered for special trips."

Redmond Quain, for F. D. Burpee, the private prosecutor, respondent, contended that it is common knowledge that the Ottawa Electric Railway Company carries on a sight-seeing business, and so the appellant company was competing with the railway company. The appellant company was transporting passengers, and, by the provisions of the franchise granted to the railway company, it alone could operate a transportation system within the city limits. The appellant company did convey passengers from one point within the city limits to another point therein. In order for there to be competition it is not necessary for the appellant company to be carrying on the same business as is carried on by the railway company. It is sufficient if it is engaged in some business which affects the business being carried on by the railway company. The business being conducted by the Red Line Ltd. does affect the business of the railway company. The appellant company does not come within the exception of clause 1(d) of the agreement. This clause permits chartered vehicles, such as cabs and taxi-cabs, to operate within the city limits, but motor-busses are not within this class.

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February 28. The judgment of the Court was read by ORDE, J.A.:—This appeal comes to us by way of a case stated by the Police Magistrate for the City of Ottawa under the combined operation of sec. 3 of the Summary Convictions Act of Ontario, R.S.O. 1927, ch. 121, and sec. 761 of the Criminal Code of Canada.

The appellant, an incorporated company, was convicted upon the complaint that on the 26th July, 1929, it did unlawfully compete with the Ottawa Electric Railway Company within the limits of the City of Ottawa in its business of transporting passengers for hire, contrary to the provisions of by-law No. 5806 of the City of Ottawa, and was fined \$10 and \$2 costs.

The material facts as set forth in the stated case are as follows:—

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On the day in question the accused operated a sight-seeing motor-'bus from the Chateau Laurier Hotel in the city of Ottawa, which is within one quarter of a mile from the city-hall of that city. After leaving the hotel, the 'bus travelled easterly and north-easterly over several city streets and beyond the city limits into the township of Gloucester, then through the incorporated village of Rockcliffe, again into the township of Gloucester, and then into the city of Ottawa, then westerly and south-westerly and north-westerly across the city by a different route from that taken at the start, and again across the north-westerly boundary of Ottawa into the township of Nepean, then across the Ottawa river into the Province of Quebec to the Aylmer-road, then along the Aylmer-road to the city of Hull, in that Province, and then by another bridge to the city of Ottawa, and back to the Chateau Laurier. The passengers all embarked at the hotel and each paid a fare of \$1 for the round trip. The 'bus did not stop to take on or put off passengers from the time it left the hotel until it returned to the hotel.

The Ottawa Electric Railway Company also operates a sight-seeing 'bus from the Chateau Laurier which follows the same route as that taken by the Red Line, and charges \$1 per passenger for the round trip.

The by-law in question was passed to carry out the terms of an agreement between the Corporation of the City of Ottawa and the Ottawa Electric Railway Company, dated the 25th January, 1924, which was confirmed and validated by the Ontario Legislature by 14 Geo. V. ch. 143, and by the Dominion Parliament by 14 & 15 Geo. V. ch. 84.

The agreement extended the term of the railway company's franchise, and provided, among other things, for the extension of its railway lines over several additional city streets. It also provided for the first time for the operation by the company of passenger motor-'busses over the city's streets. Those portions of the agreement which have any direct bearing upon the question raised here are the following:—

Clause 1. "In this agreement, unless the context shall otherwise require, the words:

"(d) 'Transportation system' shall mean any system for the operation of electric cars, either on metal tracks or without tracks, or for the operation of motor-'busses by gasoline, electricity, or other power, except the force of animals, and any system for the operation of vehicles for the carriage of passengers, but shall not include vehicles chartered for special trips, such as cabs and taxicabs."

"Clause 8(a) : The company shall have and may exercise, during the term of this agreement, and of the said agreement of June 28th, 1893, and of any extension or renewal thereof, an exclusive franchise to construct, complete, maintain and operate within the limits of the city, as such limits may be from time to time, a transportation system, on the company's present lines and any extensions or additions thereto, it being the intention of the parties hereto that the company shall not be subject to competition in its business of transporting passengers, whether such competition be in the nature of motor-busses or otherwise.

"(b) The city will not oppose applications by the company for privileges to be exercised beyond the limits of the city as such limits may be from time to time.

"(c) The company will not object to the operation, within the limits of the city, as such limits may be from time to time, of motor-busses running between any point within one-quarter mile of the city-hall and towns and villages whether incorporated or unincorporated outside the said limits, but no such motor-bus shall convey passengers from one point within the said city limits to another point therein.

"(d) The city shall pass such by-laws as the company may request and as it lawfully may, to enable the company to enforce the provisions of subclauses (a) and (c) of this clause, but the city shall not be obliged to enforce such provisions."

By-law 5806, under which this conviction was made, was passed on the 6th August, 1924. It recites the provisions of paragraphs a and c of clause 8 of the agreement, and then enacts as follows:—

"1. The word 'person' in this by-law shall include a firm and a corporation.

"2. Subject to clause 3 hereof, no person shall compete with the said company within the limits of the city, as such limits may be from time to time, in its business of transporting passengers for hire, whether such competition be in the nature of motor-busses or otherwise, but this shall not apply to the operation of vehicles chartered for special trips such as cabs and taxi-cabs.

"3. Nothing herein contained shall prevent the operation within the limits of the city, as such limits may be from time to time, of motor-busses running between any point within one-quarter mile of the city-hall, and towns and villages, whether incorporated or unincorporated, outside the said limits, but no such motor-bus shall convey passengers from one point within the said city limits to another point therein."

Then follow some other provisions not pertinent here, and the

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customary provisions for fine and imprisonment for default in payment.

The question raised by the case stated by the magistrate is as follows:—

“The question upon which the opinion of the Court is desired is whether I came to a correct determination in point of law and if not what should be done in the premises.”

Counsel for the Red Line attacked the conviction upon three grounds:—

1. That the Red Line sight-seeing passenger 'bus was not competing with the railway company, upon a proper construction of the by-law and the agreement.

2. That the 'bus was chartered for a special trip.

3. That the 'bus was operating between a point within one-quarter of a mile from the city-hall and one or more villages outside the limits of the city and did not convey passengers from one point within the city limits to another point therein.

Upon the first point Mr. Parmenter argued that, as by the agreement between the city and the railway company the rate of fare is limited to 5 cents for adults, 3 cents and 2 cents for children, and 10 cents after midnight (since slightly increased by the authority of the Railway Board, it was stated by counsel), the operation of a sight-seeing 'bus at the rate of \$1 per passenger for a round trip could not be considered competition at all.

If the force of this argument rests in the mere difference in fares, it is fraught with some danger if acceded to, because it might then be thought to justify the carriage of passengers by motor-busses from and to different points within the city limits along the same streets as those occupied by the railway company's tracks so long as the fares charged exceeded those charged by the railway company. I think it is fairly clear that any such business would come into direct conflict with the railway company's exclusive franchise under clause 8(a) of the agreement and clause 2 of the by-law.

If the railway company's business were limited to the carriage of passengers within the city at the ordinary limited rates, the argument that the carriage of people on long round trips out of Ottawa and back again could not be regarded as competing therewith, would be a powerful one. But the fact that the railway company also operates a sight-seeing 'bus service over the same route as that of the Red Line service places the question of competition upon a different footing. The two services do undoubtedly compete with each other, and the question would then resolve itself into whether or not the railway company's sight-seeing 'bus service

is within the terms and scope of the agreement and the by-law. That question is by no means an easy one to answer, and, as this case can be determined upon other grounds, I prefer not to deal with this ground until it becomes necessary to do so.

2. Was the Red Line's 'bus chartered for a special trip? The trip was special in the sense that it had a definite point of departure and return and covered a specified route. But the point of departure and return and the route were fixed by the Red Line and not by the passengers, and the particular trip was part of a regular sight-seeing service. How many passengers there were on the trip in question does not appear, but there was no chartering, as I understand that term. Each passenger took his seat and paid his fare. There was no engaging of the 'bus by the passengers as a group. The driver of the 'bus was in control and he was not subject to the orders of any or all of the passengers. In that respect the relationship of the 'bus owner or driver and the passengers would be quite unlike that which arises when one engages a cab or taxi-cab. The driver is, in such case, under the control of the hirer. And the same thing would apply to the hiring or chartering of a large 'bus by a group of people acting together or through the agency or medium of one of their number. There was no such hiring of the 'bus here. In my opinion, the 'bus was not chartered for a special trip within the meaning of the by-law.

3. The 'bus did start from a point within one-quarter of a mile from the city-hall, and did go beyond the city limits and into one village at least, namely, the village of Rockcliffe Park, to say nothing of the fact that it also crossed the Ottawa river and went through the city of Hull, in the Province of Quebec.

Mr. Quain argues that the permission given by clause 3 of the by-law only applies to a 'bus service which plies backwards and forwards between the city and one or more towns and villages for the purpose of taking passengers from one point to another on that route, and cannot be extended to a service which does not stop at or let off passengers at any of such towns or villages, but merely passes through them. I cannot follow this reasoning at all. It is quite clear that the carriage of passengers from a point within one-quarter of a mile of the city-hall to Rockcliffe Park by motor-'bus is permitted, even if it comes into direct competition with the railway company's electric street-car service to that village. If that is so, does the fact that the 'bus passes on and lets off no passengers at Rockcliffe affect the matter? If it does, all that the Red Line need do is to split the fare for the round trip, so that part of it would cover the trip from the Chateau Laurier to Rockcliffe Park back to the Chateau. Is the question whether or not

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this type of service is within the exception to be reduced to such an absurdity as this? In my judgment, the trip in question came within clause 3 of the by-law and was therefore lawful.

Mr. Quain raised two points which may be disposed of in a few words. The first was that, as para. (c) of clause 8 of the agreement and clause 3 of the by-law speak of "towns and villages" in the plural, there must be at least two such municipalities outside the city touched by the service, and that going to or through Rockcliffe Park was not enough. This contention stopped too short of its logical conclusion, for, if sound, it would require at least four such municipalities, that is, at least two towns *and* at least two villages. But of course the answer to this argument is that in agreements and by-laws of this character the plural includes the singular.

The other point would be amusing, and would not deserve to be mentioned, were it not that it was raised quite seriously. It was that, as the sight-seeing bus was not shewn to have stopped on its return to the Chateau Laurier at the exact spot where the passengers embarked, the passengers were therefore carried from one point in the city to another point therein, though they might really be no more than a foot or two apart, and notwithstanding the fact that the journey from one point to the other had in fact covered several miles! I think the exclamation point which I have just placed at the end of that sentence sufficiently answers the argument.

In my opinion the question submitted by the magistrate should be answered in the negative, and the conviction ought to be quashed.

Appeal allowed.

[APPELLATE DIVISION.]

HOLLIDAY v. TURNER.

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Mar. 5.

Contract—Alleged Agreement by Mother to Devise Property to Daughter—Action by Daughter after Mother's Death to Enforce Contract against her Estate—Evidence—Failure of Daughter to Induce Belief in her Story—Absence of Corroboration—Evidence Act, R.S.O. 1927, ch. 107, sec. 11—Alternative Claim for Improvements, Services, and Moneys Expended.

The mother of the plaintiff made a will by which she devised certain land with a house upon it to the plaintiff, who was at that time living in it with her husband. Before the will was made, according to the plaintiff's story, her husband wished to live elsewhere, and her mother said: "Do not leave: stay on here and fix this house up and I will leave it to my daughter F." (the plaintiff) "at my death." The husband and wife stayed on and made improvements, as the

plaintiff said, relying on the promise, and the mother made the will leaving the property to the plaintiff. Subsequently the mother made a new will leaving the property to another daughter. The plaintiff brought this action against the executor and the beneficiary named in the later will, substantially for specific performance of the agreement which she alleged—that the mother would devise the property to the plaintiff—or in the alternative for repayment of moneys expended on the strength of the existence of the agreement. The plaintiff's story was not believed by the trial Judge; and he was also of opinion that it lacked the corroboration required by the Evidence Act, R.S.O. 1927, ch. 107, sec. 11.

The only piece of evidence of a possibly corroborative character was a letter written to the plaintiff by her mother in which she said: "The house is yours as before arranged *after my death*, but if at any time I want to make a home for myself, I shall require the following furniture," specifying certain articles:—

Held, by the trial Judge and affirmed upon appeal, that the letter was merely a statement by the mother that she had made a will in favour of the daughter—a will which the deceased could alter or revoke at any time—and was not corroboration of the plaintiff's evidence.

Held, also, by the Court, that there was no consideration passing to the deceased for the binding contract alleged; and the alternative claim failed upon the evidence.

AN action, brought originally by Florence Holliday and her husband Frederick Holliday (whose name was by order stricken out before the trial) against Turner, the executor of, and Harriet Chalk, the sole beneficiary under, the will of Rhoda Neal, deceased, to set aside the said will (of which probate has been granted); to have it declared that the true will of the deceased is an earlier will which should be admitted to probate; that the later will is not effective to pass the estate of the deceased in certain property known as the Orville-avenue house to the defendant Harriet Chalk; and in the alternative for payment to the plaintiff of certain moneys, being the value of repairs and alterations made to the house and moneys advanced to the deceased, for board and lodging, dressmaking, etc.; and for other relief.

The action was tried before GARROW, J., without a jury, at a Toronto sittings.

W. R. Smyth, K.C., for the plaintiff.

H. H. Shaver, K.C., for the defendants, cited, in addition to the case mentioned in the judgment: *Elgin v. Stubbs* (1928), 62 O.L.R. 128; *Thompson v. Coulter* (1903), 34 Can. S.C.R. 261; and *Vavas seur v. Vavas seur* (1909), 25 Times L.R. 250.

October 14, 1929. GARROW, J.:—In substance, although it is not actually asked for, the action is one for specific performance of an alleged agreement on the part of the deceased to devise the Orville-avenue property to the plaintiff Florence Holliday, or in the alternative for the repayment of moneys expended on the strength of the existence of such agreement.

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No real proof, in the formal sense, was offered of the making of the earlier will; and, whatever the result might be as to the alleged agreement, probate of the earlier will could not in this action be granted nor that of the later will be set aside, notwithstanding the motion made in the Surrogate Court which was subsequently transferred to this Court and ordered to be disposed of at the trial of this action.

I do not know, however, that for the plaintiff's purposes it is necessary to do more than establish that which, as I have said, is the substance of the claim, and I so treat the matter. If a binding agreement be made out, the executor and beneficiary under the subsequent will would take subject thereto, and the Court could so declare and direct.

By an order made on the 12th June, 1929, the name of the plaintiff Frederick Holliday as a party plaintiff was stricken out, and thenceforward the action proceeded as the action of the wife alone.

Dealing then with the first question to be determined, was there in fact such an agreement entered into as the plaintiff alleges?

The plaintiff was married in England and came to this country with her husband in 1903 or 1904. A few months later her parents also came to Canada, and the father acquired the property in question. He subsequently conveyed it to his wife and died in 1916.

At that time the plaintiff's husband was overseas, and she with her children went to live with her mother. The plaintiff is a dress-maker, and the mother was at times a maternity nurse and for years a cook, earning in the latter capacity \$40 a month. Mrs. Chalk, the beneficiary under the later will, is also a daughter of Mrs. Neal.

When the plaintiff went to reside with her mother she agreed to pay \$10 a month. She says it was not rent or not expressed to be rent, but rather was paid to her mother to apply on the mortgage against the property. I do not think it is of much importance, but in my opinion it was in fact and in law a rental, and apparently a low one, of \$10 a month, payable quarterly, that the plaintiff paid her mother. Originally the plaintiff sought to recover these moneys as part of her alternative claim. This, however, was abandoned at the trial, and the putting forward of such a claim is not to be attributed to the plaintiff. In was, in fact, an error of her solicitors.

At the close of the war the plaintiff's husband returned to Canada. He and his mother-in-law were not friendly towards one

another and he wanted his wife to live elsewhere. The story of the plaintiff is that when this suggestion was made Mrs. Neal said: "Do not leave: stay on here and fix this house up and I will leave it to my daughter Florence at my death;" that, in pursuance of this promise, they did remain and made improvements to the dwelling house and that Mrs. Neal did make a will leaving the property to the plaintiff, which will she delivered to her for safe-keeping. This will is dated the 4th March, 1919, and the conversation relied upon is said to have taken place some time, but not long, prior to the making of the will.

It is, of course, necessary that the plaintiff's story should be corroborated—Ontario Evidence Act, R.S.O. 1927, ch. 107, sec. 11. But it is equally necessary that it be believed. See *Pieper v. Zinkann* (1927), 60 O.L.R. 443. And the opinion I formed of the plaintiff in the witness-box is that she was not, in the essential matters involved in this dispute, a credible witness. She contradicted herself repeatedly, declared that some statements already sworn to by her on her examination for discovery were not true, and as to others stated that she had not made the answers attributed to her in the notes of her evidence. At one stage in her cross-examination she abandoned a large portion of her alternative claim for payment of money, but later was permitted to withdraw from this position. A claim so readily abandoned should, it appears to me, be all the more carefully scrutinised before being allowed. She swore quite recklessly as to the number of dresses made for her mother in different years and as to other matters; and, after pledging her oath definitely to specific facts and figures, admitted that she was only guessing. She declared that during the seven years or more that her mother was out at service and living where she worked she (Mrs. Neal) spent all her Thursday afternoons with the plaintiff, who now seeks, alternatively, to charge her estate with the price of one meal for each of these days. It was proved to my satisfaction by two credible witnesses, Manson and Mrs. Turner, that by far the larger number of these weekly half days were spent elsewhere than at the plaintiff's.

I am satisfied, too, that the repairs to the house, of which so much was attempted to be made, were greatly exaggerated by the plaintiff as to their extent and value. The material was supplied by the plaintiff's husband, and he himself did all the work in his spare time. And it was inefficiently done. One or two witnesses said the repairs were a detriment to the property rather than an improvement.

Furthermore, the plaintiff's husband, who probably knows as much about the matter as any one, was not called as a witness. It

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is said that he and his wife have separated. She may have had satisfactory reasons of her own for not putting him in the witness-box, but the absence of the only other living person who can speak as to the alleged agreement is, in my opinion, a fact which tells against the plaintiff.

In her examination for discovery the plaintiff swore that the deceased threatened repeatedly to leave the property to some one else, and that she, the plaintiff, would never get it. She later denied having made these admissions. There were evidently frequent quarrels, and finally, in December, 1927, the plaintiff and her family abandoned the premises, and either then or later removed a garage which had been erected on the property by the plaintiff's husband. It is fair to say that this was a portable structure and was apparently not permanently affixed to the land upon which it stood. But its removal does not, I think, assist the plaintiff. Although her mother lived for a year longer, the plaintiff did not again have any communication with her. During her mother's last illness of several weeks' duration, the plaintiff did not go to see her (she says she was ill herself) nor did she attend her funeral. I mention these facts not as criticising her conduct towards her mother—which is not of itself important—but rather as being conduct inconsistent with what would be expected of the part of a daughter who had, as she wants us to believe, an agreement with her mother whereby she was shortly to acquire most of her small property, or, from another point of view, having such an agreement, might well expect if she remained estranged from her mother that the latter might alter her will. As a matter of fact the second will was made in the month of January, 1928, but the plaintiff says she did not know of it until after it was admitted to probate.

For these reasons and bearing in mind the remarks of Mr. Justice Middleton in the case already referred to, *Pieper v. Zinkann*, 60 O.L.R. at p. 446, I have come to the conclusion that the plaintiff's story cannot be accepted. There may have been a conversation about fixing up the house, but that there ever was a definite and distinct bargain that, in consideration of these alterations being made, the mother would devise her property to the daughter, I am unable to find, or that the will of the 4th March, 1919, was made in pursuance of any such agreement.

This should be sufficient to dispose of the main cause of action, but I should, I think, deal with the question of corroboration as well. The evidence of the plaintiff's children did not in any way corroborate the making of the agreement. They spoke of the alterations that were made to the house and the frequent occasions

upon which the deceased said to her daughter, "I'm not dead yet, you haven't got the property yet," or words to that effect. This is not the corroboration required, in my opinion. Nor was the delivery of the will to the plaintiff, if it was in fact delivered to her, and not merely left in the house by her mother. There is nothing in the language of the will itself corroborative of the making of the agreement or inconsistent with its being entirely open to the testatrix to make another and a different will at any time.

The one piece of evidence of a possibly corroborative character is the letter, exhibit 5, which is in the following words:—

"6 Clarendon Ave.,

"Toronto.

"Mrs. Holliday explanations are not necessary. The house is yours as before arranged after my *Death*, but if at any time I want to make a home for myself I shall require the following furniture the bed in the Back room which your Father died on also Pictures over mantle chairs couch several other things about the house.

"Mrs. Neal."

There is very little in the evidence to explain the circumstances under which this letter was written. The formal address and signature would seem to indicate that there had been, as there frequently was, some ill feeling. Nor are we told what "explanations" the plaintiff had been giving that were "unnecessary." Had the plaintiff been endeavouring to persuade the deceased to convey the property to her in her lifetime? The emphasis on the word *death* suggests it, but it is all pure speculation. The expression "as before arranged" is much relied on by counsel for the plaintiff, but on the whole I cannot read into this letter any more, at the most, than a statement by the mother to her daughter to this effect: "You know I have already made a will in your favour but until my death the property is mine. If in the meantime I decide to live elsewhere I shall require certain articles of furniture."

As to the plaintiff's alternative claim to be repaid the value of the improvements made to the house and for board and dressmaking, this may be disposed of in a few words.

I have already said that the value of the improvements has been very greatly exaggerated; but, whatever their value, the cost of making them did not come out of the plaintiff's pocket but out of her husband's, which is no doubt why he was added as a plaintiff in the first place.

As to the board and dressmaking, they formed no part of the consideration for the making of the agreement set up by the plaintiff. They were not furnished on the strength of the existence of

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Garrow, J. the agreement, but voluntarily on the part of the plaintiff, who
1929. said herself that she would never have charged her mother's estate
with them if it had not been for the existence of the later will.

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On these grounds the alternative claims fails as well.

There are other defences raised, such as the Statute of Frauds and the Statute of Limitations, which it is not necessary to discuss.

The action is dismissed with costs, although as to the costs I think the defendants might very well forgo them.

The plaintiff appealed from the judgment of GARROW, J.

March 5, 1930. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

W. R. Smyth, K.C., for the appellant, contended that the learned trial Judge erred in finding that the letter dated the 28th September, 1925, written by the deceased to her daughter, in which she confirms the "arrangement" made, was not a corroboration of the plaintiff's claim, but merely a statement that the mother had made a will in favour of the appellant. The wording of the letter could not be clearer in referring to the exact arrangement upon which the appellant based her claim. In the alternative, the building of the addition to the deceased's dwelling by the plaintiff's husband, pursuant to the supposed contract, constitutes an improvement for which the plaintiff is entitled to compensation.

H. H. Shaver, K.C., for the defendants, respondents, was not called upon.

THE COURT, during the course of the argument for the appellant, indicated that the letter relied upon by the counsel for the appellant was correctly interpreted by the trial Judge as being merely a statement by the mother that she had made a will in favour of her daughter—a will which the deceased could alter or revoke at any time.

MIDDLETON, J.A., said that the term "arrangement" used in the letter was an expression commonly used by persons of the station in life of the deceased in referring to having made their wills or "arranged their affairs."

THE COURT also intimated that in any event there was no consideration passing to the deceased for the binding contract alleged. The benefit from the arrangement relied upon accrued entirely to the appellant: and, living in the premises for an extended number of years at a rental so low as to be little more than nominal, the appellant could not reasonably expect any further compensation for the building of the addition.

Appeal dismissed with costs.

[IN CHAMBERS.]

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Mar. 6.

Municipal Corporations—Election of Reeve—Disqualification—Taxes on Land Overdue and Unpaid—Taxes Assumed by Purchaser from Respondent—Assessment of Respondent—Assessment and Collector's Rolls—Personal Liability of Respondent for Taxes—"Person whose Taxes are Unpaid"—Municipal Act, sec. 53(1)(r).

In August, 1927, the respondent purchased land in the township of G. The taxes for 1927, being then due and unpaid, were assumed by the respondent. In October, 1929, the respondent agreed to convey the land to D., upon certain terms, one of which was that she should assume the payment of the unpaid taxes. At that time the taxes for 1927 and 1929 were still unpaid, but those for 1928 had been paid. On the 30th December, 1929, the respondent was nominated for the office of reeve of the township; and on the 31st December, 1929, he conveyed the land to D., but the conveyance was not registered until the 6th February, 1930. The respondent was elected on the 6th January, 1930. The respondent's vendor was assessed for the taxes of 1927, and the respondent for those of 1928 and 1929, as shewn on the rolls:—

Held, that, the respondent's taxes being at the time of the election overdue and unpaid, he was not eligible to be elected a member of the township council or to sit or vote therein: sec. 53(1)(r) of the Municipal Act, R.S.O. 1927, ch. 233.

At the time of the election the respondent, notwithstanding his sale of the land, remained personally liable to the municipality for the unpaid taxes for 1927 and 1929, and until the taxes were paid the municipality was entitled to recover them from him by action, leaving him to any remedy over he might have against D.; and the words "a person whose taxes are unpaid," in sec. 53(1)(r), are not restricted to the person who by some private arrangement is the one who must ultimately pay them.

Legislative history of sec. 53(1)(r).

Sections 37, 97, and 98 of the Assessment Act, R.S.O. 1927, ch. 238, and sec. 70(4a) of the Municipal Act, as added by the Municipal Amendment Act, 1929, 19 Geo. V. ch. 58, sec. 1, considered.

APPEAL by the relator from an order of the Judge of the County Court of the County of Wentworth, under Part IV. of the Municipal Act, R.S.O. 1927, ch. 233, refusing to declare void the election of the respondent as Reeve of the Township of Glanford, in the County of Wentworth.

March 4. The appeal was heard by ORDE, J.A., in Chambers.

E. H. Cleaver, K.C., for the relator, appellant.

W. F. Schwenger, for the defendant, respondent.

March 6. ORDE, J.A.:—This is a proceeding under Part IV. of the Municipal Act, R.S.O. 1927, ch. 233, attacking the validity of the election of the respondent as Reeve of the Township of Glanford, in the County of Wentworth.

The ground for the proceeding is that the respondent was not eligible for membership in the council under para. (r) of sec.

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1930. time of the election are overdue and unpaid."

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BRIGHAM was not disqualified, and the relator now appeals from his decision,
v. pursuant to sec. 186 of the Municipal Act.
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In August, 1927, the respondent purchased gore lots 14 and 15 in the 9th concession of Glanford. The taxes for 1927 were then due and unpaid but were assumed by the respondent.

Upon evidence which the learned County Court Judge accepts, the respondent, being indebted to his sister, Mrs. Alice Dunnnett, agreed with her, in October, 1929, to convey the two lots to her upon certain terms, one of which was that she should assume the payment of the unpaid taxes. At that time the taxes for 1927 and for 1929 were still unpaid—those for 1928 had been paid. Just why the 1928 taxes were paid, while those for the preceding year were not, does not appear. Nothing turns upon that fact.

The respondent was nominated for office on the 30th December, 1929, and on the 31st December, 1929, he executed a conveyance of the lots to Mrs. Dunnnett, but the conveyance was not registered until the 6th February, 1930.

The respondent was elected on the 6th January, 1930.

According to the assessment and collector's rolls of the township, one Fred J. Cloke, who was the vendor to the respondent (though the abstract of title among the papers indicated that the grantor in the conveyance was some other person), was assessed for the taxes imposed in 1927, and the respondent for those imposed in 1928 and 1929, in the latter year his tenant being also assessed.

The learned County Court Judge held that, the lands having become the lands of Mrs. Dunnnett, the taxes "became her taxes," and that the respondent was not disqualified.

This ruling means, in effect, that, notwithstanding the state of the assessment roll and the fact that the person assessed still remains personally liable to the municipality for the unpaid taxes, the "person whose taxes . . . are overdue and unpaid" is the person who, under some private arrangement or bargain, is ultimately liable for them, and no one else. That was in substance Mr. Schwenger's contention.

With that I do not agree, and the decision of the learned County Court Judge cannot be sustained.

Mr. Schwenger relied upon the legislative history of para. (r) of sec. 53 (1), in support of his argument. In the Municipal Act of 1914, R.S.O. 1914, ch. 192, para. (s) of sec. 53 (1), which

enumerated the various grounds for disqualification, reads as follows:—

“A person who at the time of the election is liable for any arrears of taxes to the corporation of the municipality.”

This paragraph remained unaltered in sec. 53 (1) of the Consolidated Municipal Act of 1922, 12 & 13 Geo. V. ch. 72.

In 1923, by 13 & 14 Geo. V. ch. 41, sec. 1, the paragraph was amended by adding to it the words, “but this clause shall not apply to a person who is a tenant holding under a lease which provides that the landlord shall pay the taxes and who qualifies in respect of land other than that covered by such lease.”

In 1927, by 17 Geo. V. ch. 61, sec. 3, the paragraph was further amended by striking out the words “a person who at the time of the election is liable for any arrears of taxes to the corporation of the municipality” and substituting therefor “a person whose taxes at the time of the election are overdue and unpaid.”

A few months later the paragraph as so amended was embodied in the present Municipal Act, so that sec. 53, as it affects this question, reads:—

“53.—(1) The following shall not be eligible to be elected a member of the council or be entitled to sit or vote therein:—

“(r) A person whose taxes at the time of the election are overdue and unpaid, but this clause shall not apply to a person who is a tenant holding under a lease which provides that the landlord shall pay the taxes and who qualifies in respect of lands other than that covered by such lease.”

By sec. 37 of the Assessment Act, R.S.O. 1927, ch. 238, lands are always assessed against the owner and the tenant, if any, subject to certain special provisions as to unoccupied land in townships, which may be denominated “lands of non-residents.” When so assessed and a rate is imposed, the resulting tax becomes not only a charge upon the lands assessed, but imposes a personal liability to pay the same upon the person assessed therefor.

Section 97 of the Assessment Act makes this clear, and it is equally clear that by the sale of the land the person originally assessed cannot escape his direct liability to the corporation under sec. 37 and sec. 97. Section 97 is explicit: “The taxes due upon any lands with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor and from any subsequent owner of the whole or any part thereof, saving his recourse against any other person.” The person originally assessed always remains liable until the taxes are paid. The effect of a sale is not to shift the liability from

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Orde, J.A. himself to another, but, so far as the municipality is concerned,
1930. to make the purchaser liable as well.

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It was argued that the personal obligation to pay taxes upon lands was "collateral" to the lien or charge upon the lands, and some reference was made to the earlier legislation which gave a right of action for taxes which could not be recovered in some other manner: see sec. 142 of the Assessment Act, R.S.O. 1897, ch. 224. If any argument is based upon the changed legislation in this regard, it tells against the contention of the respondent. Nothing can be clearer than the language of the present Act, which not only imposes the personal liability but in the same section, namely sec. 97, declares that the taxes shall be a special lien on the land in priority to every claim, etc., of every person except the Crown.

I am not sure what Mr. Schwenger meant by the suggestion that the personal liability for taxes on land is "collateral" to the lien or charge upon the land itself. But it amounted to this, that the land was the primary source of payment and that the personal liability was merely intended to be resorted to in aid of the lien.

Section 97 lends no colour to this theory. It plainly declares the liability to be a personal one and at the same time establishes the lien. There are two remedies provided for the collection of the tax, and in that sense and no other each remedy is collateral to the other. The earlier legislation is really immaterial; but, when sec. 97 is read in the light of it, it seems plain that the Legislature intended to abandon any idea that the remedy by action was to be a secondary remedy and to establish the personal liability of the person assessed upon an equal footing with the lien, and by sec. 98 to be enforceable by action at any time.

There can be no question that, at the time of the election, the respondent, notwithstanding his sale of the lands, remained personally liable to the municipality for the unpaid taxes thereon for the years 1927 and 1929, and that until the taxes were paid the municipality was entitled to recover them from him by action, leaving him to any remedy over he might have against Mrs. Dunnett. Mr. Schwenger virtually admitted that this was so, but he argued that, when the Legislature altered the language of para. (r) in 1927 by substituting the words "whose taxes" for the words "who . . . is liable for any arrears of taxes," it must have intended to restrict the range of the previous ground for disqualification. Why should that have been the intention? It is just as reasonable to assume that the intention was to enlarge it. Just what the reason for the change in language may have been I do not know. If I did, it could not affect the construction of

the statute unless the reason is to be found in the Act itself or is to be inferred from the nature of the amendment.

Whatever the reason for the altered language may be, it is going too far to say that the Legislature deliberately intended that the words "a person whose taxes are unpaid" should be restricted to the person who by some private arrangement was the one who must ultimately pay them. Had that been the real intention, surely it would have been embodied in some more definite and appropriate words.

If one may speculate as to the reason for the amendment, it may perhaps be found in the use of the words "overdue and unpaid" in lieu of the word "arrears." But, whatever the reason may be, I must interpret the words as they are, and when I find that the respondent, who as to the 1927 taxes by virtue of his purchase, and as to the 1929 taxes by virtue of the original assessment against him as owner, is personally liable to the township, it seems to me to be too clear for argument that the taxes are "his" taxes, though they may have become those of some one else also. The word "whose" is not, of course, used here in the possessive sense, as indicating ownership. It is used in exactly the same way as the word "my" in the sentence "I have not yet paid my taxes," or as the word "his" in the expression "his debts."

Counsel for the respondent referred to sec. 1 of the Municipal Amendment Act of 1929, 19 Geo. V. ch. 58, which now requires a candidate to submit to the treasurer or collector a list of all lands in the municipality of which he is the owner or tenant and to file with his declaration a certificate that there are no taxes or rates due thereon. It is true that this makes no reference to any other lands than those of which he is then the owner or tenant, but this additional requirement of the candidate is intended as an additional safeguard, and cannot be regarded as interpreting para. (r), or qualifying it in any way. It really serves to supplement the candidate's declaration, in Form 2 of the Municipal Act, that he is "not disqualified under the provisions of section 53 of the Municipal Act or under any other Act."

In my opinion para. (r) disqualifies every person who is indebted to the corporation for taxes which are overdue and unpaid, notwithstanding that the lands in respect of which he was originally so liable have been sold to another, who, having assumed the taxes, has failed to pay them. The liability is a continuing liability for the taxes, and as between the person so liable and the corporation the original disqualification for office continues until the liability is gone.

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It ought not to be overlooked that this ground of disqualification is grouped with others, disqualifying persons having contracts with or claims against the corporation. The object of these provisions is to prevent the election to office of persons whose duty as members of the council may conflict with their personal interests. I cannot believe that the Legislature by the amendment of 1927 ever intended to narrow the ground of disqualification in the way suggested by the respondent.

The appeal must be allowed with costs, and the respondent is declared not to have been duly elected, by reason of his ineligibility for office under the provisions of sec. 53(r), and is hereby removed from his office of reeve, and he should also pay the costs of the proceedings before the County Court Judge.

The question whether any other person was duly elected was not in issue, and there must therefore be a new election. The order will direct the clerk of the municipality accordingly, pursuant to the provisions of sec. 181 (2) of the Municipal Act.

[IN CHAMBERS.]

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Mar. 7.

REX v. SOLLOWAY AND MILLS.

Criminal Law—Search-warrant—Motion to Quash—Rule 1280 of Criminal Procedure Rules of 1908 (Supreme Court of Ontario)—Notice of Motion—Time—Leave of Judge—Application for Mandamus to Compel Delivery to Justice of Articles Seized under Warrant—Status of Applicants—Persons Interested in Articles—Duty of Constable—Instructions of Attorney-General—Judicature Act, sec. 33—Criminal Code, secs. 629, 631.

Notice of motion to quash a search-warrant issued under the provisions of the Criminal Code was served on the 28th February, 1930, and made returnable by special leave of a Judge, on the 3rd March, 1930:—

Semble, that the motion was governed by the Rules passed by the Supreme Court of Judicature for Ontario on the 27th March, 1908, under the provisions of the Criminal Code now embodied in sec. 576; by Rule 1280 of these Rules at least 6 days' notice must be given; there is nothing in these Rules empowering a Judge to shorten the time; and the power given by Rule 176 of the Rules applicable to civil matters to "enlarge or abridge the time prescribed by the Rules" does not extend to the special Rules in criminal matters.

(It was conceded by the applicants that the motion could not succeed even after due notice under Rule 1280.)

The applicants moved also for an order in the nature of a prerogative writ of mandamus requiring G., a provincial police officer who executed the search-warrant, to deliver to the police magistrate who issued it, or to some other justice in the same territorial division, the books and documents taken under it. The search-

warrant was based upon a prosecution pending in Ontario. The applicants were not the accused persons; they comprised certain companies (separate entities) in which the accused were interested and a partnership (also regarded as a separate entity) of which the accused were members. In an affidavit filed in support of the application it was stated upon information and belief that some of the books and documents seized had been moved to the Province of Alberta for use in criminal proceedings there. In answer to the application were filed the certificate of the police magistrate that nothing seized under the search-warrant had been brought before him and the certificate of the Attorney-General that everything done by the officers of the Crown in connection with the disposition of anything seized under the warrant was done under his instructions:—

Held, that an order in the nature of the prerogative writ of mandamus will be granted only where there is no other remedy; and, in so far as what G. had done or might do was in excess of his duty or authority and might injure the applicants, their appropriate remedy would be an action for damages and an injunction.

Quare, as to the status of the applicants and whether a police officer can be made the subject of a mandatory order of this kind.

But, assuming that an order could be made, it would merely command G. to perform his duty under the warrant; that duty he owed to the prosecuting authorities and to no one else; he owed no duty to the applicants, and they were not entitled to the order.

Seemle, that, if sec. 33 of the Judicature Act were applicable, the instructions of the Attorney-General to G. stood in the way of the applicants.

The seizure and detention of the books and documents might be an injury to the applicants; but the public safety must override private interest.

Though nothing is said in the Code, secs. 629 and 631, or elsewhere, as to when the things seized are to be delivered to a justice, it is the police officer's duty to deliver them as soon as is reasonably and conveniently possible—he cannot justify retaining them indefinitely in his possession.

MOTION on behalf of three corporate bodies, Solloway Mills & Co. Ltd. (Dominion company), Solloway Mills & Co. Ltd. (Ontario company), Solloway Mills & Co. Ltd. (Quebec company), and Solloway Mills & Co., a partnership, for an order quashing a search-warrant and for other relief.

March 3. The motion was heard by ORDE, J.A., in Chambers.

A. G. Slaght, K.C., for the applicants.

A. W. Rogers, for the Attorney-General for Ontario and for V. A. S. Williams, a police magistrate, and E. C. Gurnett, a peace officer.

March 7. ORDE, J.A.:—This motion, made by three corporate bodies, each with the same name, and by a partnership, while asking for an order covering many specific things, is in substance twofold. First, it seeks to quash a search-warrant issued under the provisions of the Criminal Code; and, secondly, it asks for an order in the nature of a prerogative writ of mandamus requiring Major-

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General Williams, as a police magistrate, and E. C. Gurnett, a provincial police officer (and incidentally Mr. Rogers himself), to deal with certain books of account and other books and documents in a certain way.

Upon the first branch of the motion, Mr. Rogers took the preliminary objection that the notice which had been served* on the 28th February, 1930, and made returnable, by special leave of Mr. Justice McEvoy, on the 3rd March, 1930, was ineffective because the motion, being to quash a warrant in a criminal matter, was governed by the Rules passed on the 27th March, 1908, under the provisions of the Criminal Code now embodied in sec. 576 of the present Code: see Appendix II. in 16 O.L.R. p. 667, and Holmested's Judicature Act, 4th ed., p. 140.

By Rule 1280 of those Rules, at least 6 days' notice must be given. And there is nothing in those Rules empowering a Judge to shorten the time by giving leave or otherwise. The power given by Rule 176 of the Consolidated Rules (in civil matters) to "enlarge or abridge the time prescribed by the Rules" is clearly limited to proceedings governed by those Rules and cannot extend to the special Rules in criminal matters. It is, however, unnecessary to deal formally with this preliminary objection, because Mr. Slaght conceded that in any event he could hardly hope to succeed in quashing the warrant itself, even after due notice under Rule 1280.

The other branch of the motion really resolved itself into an application for a mandamus (that is an order in the nature of the old prerogative writ of mandamus) requiring the constable, Gurnett, to deliver the books and documents taken under the search-warrant to Major-General Williams as the police magistrate who issued the warrant or to some other justice of the peace in the same territorial division.

Section 629 of the Criminal Code provides for the issue of a warrant authorising a constable to search for articles which there is reasonable ground to believe will afford evidence as to the commission of an offence and to seize and carry the same before the justice issuing the warrant or some other justice for the same territorial division. Section 631 provides that the justice before whom an article seized is brought may detain it, taking reasonable care to preserve it until the conclusion of the investigation; and if any one is committed for trial the justice may order it to be detained for the purpose of evidence at the trial.

The status of the applicants to make the application is questioned. They are not the accused themselves. They comprise three joint stock companies, in which the accused are doubtless interested,

but which are of course distinct entities; and there is also a partnership said to consist of or to include the two accused, but the partnership comes before the Court in its character of a partnership, and for the purposes of this motion must, I think, be treated as a separate entity.

In support of the motion is an affidavit made by an accountant in the employ of the four applicants. It is rather unsatisfactory in that it is almost wholly based on information and belief, the information being supplied the deponent by persons who are counsel and solicitors for the applicants. There was an earlier seizure of the books, etc., made under a search-warrant issued by Major-General Williams to Gurnett. That warrant was based upon criminal proceedings for conspiracy against Solloway and Mills in the Province of Alberta, but it and all proceedings under it were quashed on the 20th February, 1930, by my brother McEvoy, who held that there was no power given by the Code or otherwise to a magistrate in Ontario to issue a search-warrant in support of criminal proceedings pending in another Province. Whether that ruling was correct or not, sitting here as a single Judge, I should be bound by it if it had any bearing upon the present motion. That it has no bearing is clear, for the search-warrant here is based upon a prosecution pending in Ontario, and is virtually admitted to be valid, as I have said.

It further appears from the affidavit that the search-warrant here was issued immediately upon the rendering of Mr. Justice McEvoy's decision, and the books and other documents were again seized by Gurnett thereunder.

The affidavit further states upon information and belief that some of the books and documents have been moved to the Province of Alberta for use by the Attorney-General of that Province in the criminal proceedings there.

There is no affidavit filed on behalf of the Crown, and Mr. Rogers declined to make any admission as to whether anything has been sent to Alberta or not. He presented to the Court, however, two certificates, one by Major-General Williams stating that nothing seized under any of the search-warrants issued by him on the 20th February, 1930, had been brought before him, the other by the Attorney-General, "that everything done or omitted or proposed to be done or omitted by Arthur W. Rogers, solicitor, Department of the Attorney-General, and E. C. Gurnett, inspector, Criminal Investigation Department, Ontario Provincial Police, in the exercise of their offices as officers of the Crown, in connection with the disposition of anything seized from the said defendants, or from companies or partnerships bearing their names or

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under their control under search-warrants dated the 20th day of February, 1930, and issued by V. A. S. Williams, Esquire, Police Magistrate in and for the Province of Ontario, were and will be done under my instructions."

The bearing of the last mentioned certificate upon these proceedings I will discuss later.

The motion as it presents itself to the Court, therefore, comes down to this. Articles belonging to certain persons have been validly seized by a constable under a valid search-warrant. It is alleged that his duty under the Criminal Code is forthwith to deliver them to the justice who issued the warrant or to some other justice within the same territorial division. He has not done so, and it is said that instead he has sent them out of the Province.

The conduct of the constable of which the applicants complain consists of either one of two things which are clearly distinct from each other, and it may perhaps comprise both. If he has sent the articles away or has otherwise dealt with them in a manner not authorised, he may have exceeded his duty or his authority. In so far as he has failed to deliver the articles to a justice of the peace he may have fallen short of his duty.

Now it is quite clear that a mandatory order, by which I mean an order in the nature of the prerogative writ, will be granted only when there is no other remedy. *Rich v. Melancthon Board of Health* (1912), 26 O.L.R. 48, and *Re Rowe and Harris* (1928), 63 O.L.R. 163, may be referred to. And it is to be noted that in Chaster on Public Officers (1909), p. 648, where the question of the remedy by prerogative writ against public officers is discussed, it is stated that "inasmuch as the cases in which damages could occur on account of breach of duty which are not obtainable by action are very rare, it is a remedy which for practical purposes need not be further discussed."

In so far as what Gurnett has done or may do is something in excess of his duty or authority and may injure the applicants, their appropriate remedy would seem to be an action for damages and an injunction, and there is therefore no justification for the issue of a mandatory order.

If Gurnett by detaining the articles instead of promptly delivering them to a justice of the peace has not yet completed the duty devolving upon him under the warrant, other considerations arise. It is argued by Mr. Rogers that secs. 629 and 631 of the Code say nothing as to when the things are to be delivered to a justice, and that therefore it may be assumed that they are still on their way there. It is true the Code is silent as to that, but I should assume that it is the constable's duty to deliver them as soon as is

reasonably and conveniently possible, and that he can no more justify retaining them indefinitely in his possession, than he could justify taking and imprisoning indefinitely in his own house a man whom he had arrested, when his ordinary duty would be to take him to a police station or lock-up or other authorised place of custody.

But this is not the point here. The applicants here are seeking redress by an unusual remedy. Assuming that a peace officer can be made the subject of a mandatory order of this kind at all—as to which I am extremely doubtful—the order would merely command him to perform his duty under the warrant. That duty he owes to the prosecuting authorities, and, as far as I can see, to no one else. If he falls short of it, or refuses to carry it out, then the persons interested in its performance (that is the Attorney-General or other officers of the Crown interested in the criminal prosecution) would seem to be the only persons who could seek the extraordinary aid of the Court by a mandatory order. If the owners of the articles are damaged or the circumstances imperil the safety or integrity of their property, they have their civil action for damages and for an injunction, including a mandatory injunction. Upon that ground again, and because the constable owes no duty to them, I think the applicants are not entitled to the order they ask.

The Crown also relies upon the provisions of sec. 33* of the Ontario Judicature Act, R.S.O. 1927, ch. 88. If the word “mandamus” there includes a mandatory order in the nature of a prerogative writ, and is not confined to a mandatory injunction granted in an action, the instructions of the Attorney-General to Gurnett would seem to stand in the way of the relief sought for by the applicants. And it might also form a serious obstacle against obtaining an injunction or a mandatory injunction in an action.

It is probably unwise to try to define the precise application of sec. 33 to this proceeding. I prefer to rest my judgment upon the simple ground that the applicants have failed to make out a case for the extraordinary relief asked for upon this motion.

Some observations were made as to the effect which the seizure and detention of the applicants’ books and documents might have upon the business of the applicants and of their customers. This

* 33. No extraordinary remedy by way of injunction, mandamus or otherwise shall lie against the Crown or against any Minister thereof or any officer acting upon the instructions of any Minister for anything done or omitted or proposed to be done or omitted in the exercise of his office including the exercise of any authority conferred or purporting to be conferred upon him by any Act of this Legislature.

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Orde, J.A. may be important, but I am not really concerned with that question. It is obvious that, in the prosecution for an alleged crime, persons other than the accused may be put to serious inconvenience and even loss. For example, A., a lodger with B., stabs some one with B.'s bread-knife. The knife is seized by the police and detained until the trial. B., through no fault of his own, has to do without his knife or to buy or borrow another. It simply can't be helped. The public safety must override his private interest. This case differs only in degree from the simple one just mentioned.

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And I should like to add that it would be unfortunate if, in a case of this kind, the Code must be interpreted in such a way as to hamper the administration of justice under the Criminal Code throughout the whole Dominion, when the Attorney-General of one Province seeks to assist that of another in the prosecution of an alleged crime.

The motion will be dismissed with costs.

[APPELLATE DIVISION.]

1930.

RUDLEN V. BRIDGEMAN.

March 11. *Negligence—Unsafe Premises—Injury to Invitee by Falling through Hole in Floor—Extent of Invitation—Ordinary Care on Part of Invitee—Negligence—Contributory Negligence—Findings of Trial Judge—Appeal.*

The plaintiff went to the defendant's butcher-shop to buy chops; he asked the employee who served him about peas, and the employee motioned with his head to a shelf where there were peas; the plaintiff walked across the shop towards the shelf, but stepped into a hole in the floor near the shelf, fell into the cellar, and was injured. The employee knew that the trap-door which guarded the hole was up, and did not warn the plaintiff. The shelf was in a part of the shop to which customers occasionally went. An action brought for damages for the plaintiff's injuries was tried without a jury by a County Court Judge, who found in the plaintiff's favour:—*Held*, upon appeal, that the plaintiff (an invitee) was not in a part of the shop to which he was not invited, and it could not be said that he was not exercising ordinary care because, going across a shop to look at goods, upon a particular shelf, he did not cast his eyes on the floor to see that no trap had been laid for him.

Indermaur v. Dames (1866-7), L.R. 1 C.P. 274, 2 C.P. 311, and *Sutcliffe v. Clients Investment Co.*, [1924] 2 K.B. 746, followed. *Connor v. Cornell* (1925), 57 O.L.R. 35, distinguished.

And *held*, affirming the findings of the trial Judge, that the plaintiff's injuries were the result of the defendant's negligence; and (MASTEN, J.A., doubting, and FISHER, J.A., dissenting) that the plaintiff was not guilty of contributory negligence.

AN appeal by the defendant from the judgment of the County Court of the County of York (LEE, Jun. Co. C.J.), in favour of the plaintiff for the recovery of \$850 in an action for damages for injuries sustained by the plaintiff by falling through an opening in the floor of the defendant's butcher-shop into the cellar, the trap-door which guarded the opening being left open. The plaintiff entered the shop to make purchases and was apparently in the position of an invitee, but the defendant alleged that he was in fact a trespasser at the place where he was injured, having left the part of the shop to which customers were invited.

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February 26. The appeal was heard by RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

J. D. Lucas, for the appellant. The learned trial Judge erred in finding that the plaintiff was a licensee in that part of the defendant's store where the accident occurred: *Connor v. Cornell* (1925), 57 O.L.R. 35. In any event the plaintiff was guilty of contributory negligence in not observing the opening in the floor.

A. C. McNaughton, for the plaintiff, respondent. He had a right to go into the store without looking at the floor, because he had been there several times before, with the permission of the defendant, and the evidence shews that customers were in the habit of going into that part of the store. He was not aware of any opening in the floor of the premises and was under no duty to anticipate that such an opening might be there.

March 11. RIDDELL, J.A.:—The facts of this case, as found on satisfactory evidence by the learned County Court Judge at the trial, are that the plaintiff went to the shop of the defendant where he conducted a business of a butcher and also sold other articles. Buying some chops, the plaintiff asked the clerk who was cutting them off, about peas—"Have you got any nice small peas?" The clerk, being busy cutting off the chops, said, "Yes, have lots on the shelf over there"—indicating with his head the shelf he meant. According to the plaintiff's evidence, he had, about 10 days before, been examining the goods on that shelf with another clerk; however that may be—and this is not noticed in the written judgment—the plaintiff naturally took the motioning of the clerk busy at the meat as an invitation to look at the peas on the shelf, himself. He walked over across the store to go to the shelf and looked at the peas in stock, and fell into the cellar through an opening of an open trap-door in the floor. The place to which he was going was not infrequently visited by customers; and there can be no doubt

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1930. It is, I think, equally beyond doubt that the conduct of the clerk was an implied invitation to the plaintiff to go there.

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Riddell, J.A. At the trial before his Honour Judge Lee, negligence actionable in its character was found against the defendant; that the plaintiff was not guilty of contributory negligence was also found; and judgment was given against the defendant for \$850 and costs.

The defendant now appeals—the grounds being (1) that the plaintiff had no right to go where the accident happened, and (2) that he was guilty of contributory negligence.

The extent and character of the care required by the law of persons in the position of the defendant was discussed at some length, and it seems to me that this may be considered first.

Since *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274, 2 C.P. 311, it has always been recognised that when one person comes upon the premises of another for the purpose of transacting any business with him, which implies an inducement held out from the owner to him, the law presumes a right on the part of the stranger to all reasonable and proper precautions for his safety, that is, that the right of the owner of property to use it as he pleases is limited by the right of the other that the property-owner shall take reasonable care of his safety while on the premises. The obligation on the owner has been well put by Beven, *Negligence in Law*, 4th ed., p. 50, in the negative form, that he is liable for “neglect to take some step to make their condition” (i.e., the condition of his premises) “with regard to strangers lawfully doing business there, of such safety that no greater than ordinary care would be required to avoid accident.” The standard of care, then, required of a property-owner is perfectly clear—he is not an insurer, if his premises are such that, while there may be defects, they are not such as would occasion an accident, the visitor exercising ordinary care, the defects, if any, should an accident happen through them, do not render the owner liable—the defects being but the *causa sine quâ non*, the condition, of the casualty, the *causa causans* being the want of ordinary care of the visitor or some other cause.

I can see no ground for the proposition that the plaintiff was in a part of the defendant's premises to which he had not been invited—it was a part of the shop to which customers occasionally went, and moreover there was the implied invitation of the clerk then present.

The real question is not, as we have seen, whether the premises were in fact defective—that every one will admit—but whether they were so defective that the exercise of ordinary care would not have avoided the accident. I decline to accede to the proposition

that a customer is not exercising ordinary care if and when he, invited to look at some goods on a particular shelf, and going across a shop to do so, does not cast his eyes on the floor to see that no trap has been laid for him. I am of opinion that he cannot be considered as not exercising ordinary care if, having his eyes on the goods to be inspected, he does not see a hole in the floor, which he had no reason to expect to be there. Negligence can be predicated only on what one either expects or ought to expect, and it would, in my view, be monstrous to hold that a customer ought to expect that the owner may violate his legal duty and leave the floor, over which he invites his customer to walk, with a hole in it through which the customer may fall.

I can find here no want of ordinary care on the part of the customer under the circumstances, nothing of what may be called contributory negligence—if such terminology is proper in such a case—no negligence, in short; and I think that the appeal must be dismissed with costs.

MASTEN, J.A.:—The defendant is the proprietor and occupant of a butcher-shop. On the 17th April, 1929, at about 5.45 o'clock in the afternoon, the plaintiff came to the defendant's shop, bought chops, and asked the employee who was serving him about canned peas. The employee, Furse, said they had peas, and, as found by the trial Judge, made some gesture from which the plaintiff understood that he was directed towards a shelf where the peas were, either for the purpose of inspection or to get the peas for himself. This shelf is in a part of the shop infrequently visited by customers. As to the character of the lighting at the time when the plaintiff went there, I have not been able to find any satisfactory evidence.

In the floor of that part of the shop to which the plaintiff went, there is situate a trap-door which, when opened, admits to stairs leading to the cellar under the shop. This trap-door was open when the plaintiff went to inspect the peas, and he walked into the opening, fell to the bottom, and injured himself, and now claims damages from the defendant.

The legal status of the plaintiff is that of an invitee entering the premises of the defendant on his implied invitation, with an interest common to them both, namely, to get goods which the defendant wished to sell and the plaintiff to buy: *Indermaur v. Dames*, L.R. 1 C.P. 274, 2 C.P. 311; *Sutcliffe v. Clients Investment Co.*, [1924] 2 K.B. 746.

In the case last mentioned, Scrutton, L.J., says (p. 757):—
“The rights of an invitee who does not pay for his presence are stated in *Indermaur v. Dames*, and are that the owner of

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1930. ing or precaution against traps, whether existing or new, dangers
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v. reasonable care and prudence. Against dangers which are not
BRIDGEMAN. traps in this sense the owner is under no liability—that is, he
Masten, J.A. does not warrant the premises safe or as safe as reasonable care
could make them.”

The defendant alleges that the plaintiff was really a trespasser, in that he had left that portion of the store to which customers making purchases were invited; and, relying on the case of *Connor v. Cornell*, 57 O.L.R. 35, submits that, although an invitee would be entitled to recover damages for injuries sustained by reason of an unusual danger unknown to him, yet the liability of the defendant is only commensurate with the extent of the invitation, and that here the plaintiff was not invited into that part of the premises where the accident occurred, and where the unusual danger existed.

Little, if any, question arises regarding the law, but whether the plaintiff was in truth invited into that part of the shop where the accident occurred, and whether the defendant through himself or his employees was guilty of reasonable care to prevent damage to the plaintiff from an unusual danger, and whether the plaintiff was guilty of contributory negligence, are all questions of fact to be decided by the jury, or in the present case by the Judge sitting as a jury.

In his evidence at the trial, the plaintiff states the facts as follows:—

“While he (Furse) was proceeding to cut the chops off the pork I said to him, ‘I think I will have them breaded, it would be nicer,’ and I said, ‘I think that a can of nice small peas would go very nice with that, have you got any nice small peas?’ and he said, ‘Yes, have lots over on that shelf over there.’

“Q. Did he point to it? A. No, he just motioned his head; he was cutting the chops at the time. I proceeded across to the—

“Q. ‘There is lots over on that’—A. On that shelf.

“Q. Motioning to cross the store, you did? A. Motioning I proceeded—

“Q. From where you were standing? A. From where I was standing where he was cutting the chops, on this side of the store, across the store, towards the shelving with my eyes focussed on the shelving to locate the peas. Unfortunately, I did not get quite that far. There was an open trap-door through which I tumbled headlong down, landing on my heart and left shoulder, I presume.”

The defendant denies the invitation implied from the gesture to which the plaintiff refers, and the trial Judge finds as follows:—

“I am of the opinion that some of these clerks were in a hurry. The store was closing up. It is a likely thing for a clerk to save himself some trouble, and it also might lend a little corroboration to the other testimony adduced upon the plaintiff’s side, that in a moment of weakness, so to speak, Furse did point to the display counter in answer to the plaintiff’s inquiry, intending the plaintiff to get the can of peas himself, and I find as a fact that such was the case. I also find as a fact that the plaintiff was not aware that there was or ever had been an opening in the floor of this store, because, had he been aware of this opening, it would have been his business to have taken very much greater care than he otherwise would if he was not aware of it. And, therefore, I cannot find upon the evidence adduced that the plaintiff was in any way guilty of contributory negligence which contributed to this accident.”

The defendant was not in the shop at the time of the accident. The persons present were Mrs. Bridgeman, his wife, who was in the office, and Gow, Furse, and Browning, employees.

The trap-door was closed at the time when the plaintiff entered the shop. Furse was the employee who was cutting the chops for the plaintiff. While he was so occupied, Gow directed Browning to go to the cellar and get some celery, and this direction was heard by Furse, who testifies as follows:—

“Q. You proceeded to cut—A. Four pork chops.

“Q. What other conversation took place? A. Well, I heard John Gow say to Ernest Browning, ‘Go down in the cellar and bring up some celery.’

“Q. You heard John Gow—A. Say, ‘Ernest, go down and bring up some celery.’

“Q. What other conversation, if any, took place between you and Mr. Rudlen? A. None, none whatever, sir.”

He thus denies any question with respect to the can of peas, but his evidence is not given credit by the trial Judge, and if, as the trial Judge finds, he did direct the plaintiff to go and inspect or get the can of peas, he did so knowing that Browning was going down into the cellar, and would necessarily lift the trap-door in order to go down the stairs. It therefore appears to be entirely plain that the defendant, through his employees, failed to exercise reasonable care to prevent the plaintiff from suffering damage from the unusual danger of the open trap-door, and

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that Furse knew or ought to have known, when he directed the plaintiff to go to inspect the peas, that the trap-door would be open.

It only remains to consider the question of contributory negligence. At the hearing of this appeal I doubted the finding of the trial Judge that the plaintiff was not guilty of contributory negligence. It occurred to me that, when the plaintiff undertook to visit a part of the shop where customers rarely went, and in which it seems probable that the lighting was poor, without looking to see what was in front of him (for his gaze was directed at the cans of peas on the shelf), he failed to use reasonable care on his part for his own safety, because the danger was obvious, if he had paid attention to where he was going. Since the hearing I have considered the evidence to ascertain whether the finding of the trial Judge of no contributory negligence should be reversed. Being a finding of fact by a Judge who saw the witnesses, it ought not to be reversed unless clearly wrong. Under the circumstances the trial Judge should have a more vivid realisation of precisely what took place than I can gain from the record before us. It is all very close to the line, and depends on the conclusion reached on conflicting testimony.

Coupling this consideration with the fact that other members of this Court deem the conclusion of the trial Judge as to contributory negligence to be warranted by the evidence, I find myself, though doubting, unable to dissent from their conclusion. What I might have decided as a trial Judge is, in the circumstances, irrelevant.

The appeal must be dismissed with costs.

ORDE, J.A.:—I agree that this appeal must be dismissed.

The points involved are solely questions of fact.

The grounds of the defendant's negligence in the performance of the duty he owed the plaintiff are based upon the principles laid down in *Indermaur v. Dames*, L.R. 1 C.P. 274, 2 C.P. 311. And there is no distinction that I know of in applying those principles between the case of a permanent opening and an opening which becomes dangerous by the negligent omission to close a trap-door over it.

As to the alleged contributory negligence of the plaintiff in not "using reasonable care on his part for his own safety," to quote the words of Willes, J., in *Indermaur v. Dames*, L.R. 1 C.P. at p. 288, that was a question of fact upon which the finding of the trial Judge should not be disturbed unless it is clearly wrong.

In the present case, while the plaintiff might be bound to take reasonable care to avoid stumbling over a box of fruit or a bag of potatoes leaning against the counter, I cannot think that there was any lack of reasonable care on his part in failing to observe an opening in the floor beneath the shelves to which he was invited by the shopman to go.

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FISHER, J.A.:—I am of opinion that the learned County Court Judge was right in holding that the defendant was guilty of negligence, but wrong in finding that there was no contributory negligence.

At the conclusion of the argument, I formed the opinion that the defendant was negligent and the plaintiff guilty of contributory negligence, and that, as the degree of negligence was about equally divided, all that the plaintiff was entitled to recover was one-half of the damages awarded; and, after a careful reading of the evidence and the case-law applicable, I see no reason to change my opinion.

The defendant had a right to have the trap-door in his premises; and, whilst under a legal obligation to his customers to take reasonable care to prevent injuries to them from falling into the trap-door hole leading to the cellar, his liability is *limited* to the extent that he is only bound to take reasonable care to protect his customers from dangers which are more or less hidden, and not from dangers that are not concealed or obvious to any one using the premises with ordinary care.

All actions for negligence are founded on the doing, or omitting to do, something in the given circumstances. Now, in the present case, assuming that the nod of the clerk, who was cutting the pork chops, to the plaintiff, amounted to an invitation for the plaintiff to leave the place where he was and to go to the place indicated by the nod, that fact did not, in my mind, license the plaintiff to proceed regardless of everything or anything that might happen to be in his way, or with his eyes shut or focussed entirely upon the peas located in some shelf. Had the plaintiff, as he was bound to, exercised ordinary care, unquestionably—the light being quite sufficient where the trap-door was located—he would or should have seen the trap-door standing up on one side of the hole and avoided the hole. What possible right had the plaintiff to ignore everything that might be in his path and keep his eyes, as I have stated, focussed on one spot only and then claim damages for his injuries, any more than the customer who undertakes to go wandering about a shop and pay no attention to where he is going? That a customer in a shop is not expected to see and

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 1930. was not, in all the circumstances of this case, a hidden danger;
 the door was up, the hole was there, and the place had sufficient
 RUDLEN light, so that we have here a danger which was not concealed but
 v. exposed and obvious to any one exercising ordinary care.

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Having found that the plaintiff was guilty of contributory negligence, I have to determine what negligence, if any, the defendant was guilty of. I can find no evidence establishing negligence merely in the condition of the premises, as in my opinion they were safe, but I do find that there was negligence in the operation of the shop by the defendant's employee (Furse). Furse admitted that he knew, just before or at the time the plaintiff was starting or about to start in the direction of the trap-door to have a look at the peas, that a fellow-employee (Gow) had ordered another employee (Browning) to go to the cellar to get some celery, and that the trap-door would be lifted, and Furse omitted to warn the plaintiff, as he should have, to be on the look-out. That omission in my opinion constituted negligence on the part of the defendant's employee in a failure to take reasonable care to protect the customer (the plaintiff) for which the defendant must be held responsible.

The appeal should be allowed in part, and the damages awarded by the County Court Judge reduced to \$425. Success being divided, there should be no costs of this appeal.

Appeal dismissed (FISHER, J.A., dissenting in part).

[APPELLATE DIVISION.]

1930.

KEY v. KEY.

March 11.

Foreign Law—Proof of—Presumption—Onus—Negligence in Foreign Country in Operation of Motor-vehicle—Injury to Gratuitous Passenger—Contract or Tort—Action by Father against Son—Volenti non Fit Injuria.

The plaintiff sued the defendant, his son, in a County Court to recover damages for personal injuries sustained in the State of New York by reason of the defendant's negligence in the operation of his motor-vehicle, wherein the plaintiff was a passenger as the guest of the defendant. The plaintiff alleged violation of the statutory law of New York State, and also negligence at the Common Law, but failed at the trial to adduce any evidence of the law of New York, and because there was no evidence of that law the County Court Judge dismissed the action:—

Held, upon appeal, that the general foreign law is presumed to be the same as our own; and the onus of proving that it is different is on those who contend that it is.

The action might be considered as either in contract or in tort: when one entrusts himself or his property to another to be carried, there is an implied contract that the traveller shall use ordinary care in the transport; and, in the absence of special circumstances, the fact that the passenger is the father of the driver has no significance.

There being no special circumstances, and the law of New York State being presumed to be the same as ours, the plaintiff was entitled to judgment for the amount of damages found by the County Court Judge.

Review of the authorities.

Nouvelle Banque de L'Union v. Ayton (1891), 7 Times L.R. 377, specially referred to.

Walpole v. Canadian Northern Railway Co., [1923] A.C. 113, and *McMillan v. Canadian Northern Railway Co.*, [1923] A.C. 120, distinguished.

Per MASTEN, J.A.:—The evidence failed to justify the application of the maxim *volenti non fit injuria*.

AN appeal by the plaintiff from the judgment of the County Court of the County of York (LEE, Jun. Co.C.J.) dismissing an action for the recovery of damages for personal injuries to the plaintiff caused, as alleged, by the negligence of the defendant, who was the plaintiff's son, in the driving, in the State of New York, of a motor-car in which the plaintiff was a passenger.

February 13. The appeal was heard by RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

A. A. Macdonald, for the appellant.

E. A. Richardson, for the defendant, respondent.

March 11. RIDDELL, J.A.:—This is an appeal from the judgment of his Honour Judge Lee in the County Court of the County of York, whereby he dismissed the plaintiff's claim, though with regret, conceiving that he was unable under the law to give him relief.

I accept the findings of fact of the learned Judge, justified as they are by the evidence at the trial.

The plaintiff, the father of the defendant, at the request of his son, accompanied him in the son's automobile from Toronto to Lockport, New York State, on the 13th April, 1929, as the guest of the son. The son operated his automobile himself, and so operating it was guilty of negligence in New York State, which had the result of the automobile being overturned and the plaintiff injured.

The plaintiff in his statement of claim alleges violation of the statutory law of New York State, and also negligence at the

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App. Div. Common Law. At the trial he failed to give any evidence of the law of New York, and because he had no evidence of such law the learned County Court Judge dismissed the action.

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Riddell, J.A. otherwise, on proper terms; but I think there is no necessity of this being done.

Assuming that the case is to be decided upon the law of the foreign State, that law must be established as a fact—the Court cannot take judicial cognisance of it: Story's Conflict of Laws, 8th ed., pp. 863-868; and even the decision of a Judge of the foreign State is not conclusive, as was once thought: *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 2 K.B. 623. But, disregarding special laws such as Bankruptcy, etc., the general foreign law is presumed to be the same as our own: *Brown v. Gracey* (1821) D. & R. (N.P.) 41, note, 25 R.R. 782; *Smith v. Gould* (1842), 4 Moo. P.C. 26; *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115, at p. 129; *The Colorado*, [1923] P. 102, at p. 111; and the onus of proving that the foreign law is different from ours is on those who contend that it is: *Dynamit Actien Gesellschaft v. Rio Tinto Co.*, [1918] A.C. 292, 301. Cf. *Nouvelle Banque de l'Union v. Ayton* (1891), 7 Times L.R. 377.

The action of the plaintiff might be considered as either in contract or in tort, just as the passenger in a railway carriage has his option in case he is injured by negligence for which the railway company is responsible.

When any one entrusts himself or his property to another to be carried, whether in a gig, a carriage, a boat, a railway carriage, or an automobile, an implied contract is at once raised for the carrier to use ordinary care in the transport, and the fact that the transport is gratuitous is *nihil ad rem*: *Great Northern Railway Co. v. Harrison* (1854), 10 Ex. 376. There are, of course, many cases in which a passenger injured by the negligence of the driver of an automobile cannot recover from him: the passenger may be precluded if he exercise control over the driver; even without such control he may be precluded if, himself intoxicated, he goes with a driver who is intoxicated and so causes the accident: *Delaney v. City of Toronto* (1921), 49 O.L.R. 245; and cf. *Plant v. Township of Normanby* (1905), 10 O.L.R. 16; *Miller v. County of Wentworth* (1913), 5 O.W.N. 317, 25 O.W.R. 270; *Roe v. Township of Wellesley* (1918), 43 O.L.R. 214. But, in the absence of such special circumstances, the fact that the passenger is the father of the driver has no significance. *Gosnell v. Township of Southwold* (1919), 46 O.L.R. 265, *Armand v. Carr*, [1926] S.C.R. 575,

at p. 581, *Coop v. Robert Simpson Co.* (1918), 42 O.L.R. 488, *Mills v. Armstrong* (1888), 13 App. Cas. 1, and the like cases, may also be looked at.

There are no special circumstances here, and the plaintiff by our law is entitled to recover. The law of New York State being presumed to be the same as ours, there is no reason why he should not have his judgment for the amount found by the County Court Judge, viz., \$1,500, and costs, both of the Court below and of this appeal.

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MASTEN, J.A.:—In actions of tort the principle that, in the absence of proof of the foreign law, that law will be presumed to be the same as the law of Ontario, is beyond controversey.

The only question is as to the onus of proof, and counsel for the respondent relies on the cases *Walpole v. Canadian Northern Railway Co.*, [1923] A.C. 113, and *McMillan v. Canadian Northern Railway Co.*, [1923] A.C. 120.

But a perusal of the judgments of Viscount Cave in those cases makes it plain that the law of British Columbia in the one case and the law of Ontario in the other case was either admitted or proved so that it was before the Court, and the presumption which applies in the absence of proof of the foreign law did not in those cases arise.

The rule with respect to the onus of proof of the foreign law has been stated in these terms:—

“In the administration by English Courts of private international law it is presumed *until the contrary is proved* that the foreign law applicable to the case in hand is similar to the law of England, and the Court will accordingly apply English law to the case unless there is evidence before it establishing the foreign law to some different effect. The cases cited in support of that proposition appear to me to bear it out and I refer only to the last of them, namely, *Nouvelle Banque de l'Union v. Ayton*, 7 Times L.R. 377.”

In that case the head-note is as follows:—

“At the trial of an action on a promissory note the defence was that it was not negotiable, and experts were called to prove that by Belgium law the note was not negotiable, the jury being unable to make up their minds, the Judge entered a verdict and judgment for the plaintiffs. *Held*, that as the defendant had failed to satisfy the jury that the note was not negotiable by Belgium law the plaintiff was entitled to recover by English law, and that judgment had been properly entered for him.”

App. Div. The appeal was argued before Lord Halsbury, L.C., Lord
 1930. Esher, M.R., and Fry, L.J. In the course of his judgment the
 Lord Chancellor said that he took the finding of the jury to
 mean that proof of the Belgian law failed, and that being so, as
 KEY the defendant had to prove it, the plaintiff was entitled to recover
 v. by English law. And Lord Esher observed: "The proposition
 KEY. contended for on the part of the defendant, that on any foreign
 Masten, J.A. note or bill evidence be given that by the foreign law it was
 negotiable, was most formidable and startling. But, fortunately,
 it was not upheld by the authorities cited." Lord Justice Fry
 concurred.

In my opinion the evidence entirely fails to justify the appli-
 cation in this case of the maxim *volenti non fit injuria*.

The appeal should be allowed and judgment should be entered
 as proposed by my brother Riddell.

ORDE and FISHER, JJ.A., agreed with RIDDELL, J.A.

Appeal allowed.

[APPELLATE DIVISION.]

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TOBER V. LAMPMAN.

March 11.

*Evidence—Conversion of Goods—Larceny—Evidence—Mere Scintilla
 not Sufficient—Reversal of Finding of Trial Judge.*

In an action for conversion of property of the plaintiff, the facts al-
 leged by him were such as, if established, would shew the defend-
 ant to have been guilty of larceny; but there was no real evidence
 against the defendant—nothing more than a mere scintilla, and
 that is not now sufficient to warrant a judgment.

Giblin v. McMullen (1868), L.R. 2 P.C. 317, followed.

The rule against a mere scintilla is especially applicable in a case
 in which a state of facts is alleged that would make the opposite
 party guilty of a crime.

The finding of a County Court Judge reversed upon appeal.

AN appeal by the defendant from the judgment of the County
 Court of the County of Lincoln in favour of the plaintiff in an
 action for the value of 47 turkeys of the plaintiff alleged to have
 been converted by the defendant.

February 25. The appeal was heard by RIDDELL, MASTEN,
 ORDE, and FISHER, JJ.A.

F. R. Murgatroyd, for the appellant.

D. F. Pepler, for the plaintiff, respondent.

March 11. The judgment of the Court was read by RIDDELL, J.A.:—This is a case of alleged conversion of certain turkeys. The learned County Court Judge, being of the opinion that the conversion was proved, gave judgment for the plaintiff for \$200 and costs.

While this is a civil action, the facts as found by the trial Judge would necessitate a conviction for larceny if the defendant were prosecuted criminally—and it must be said that, if the findings are true, the defendant should be so prosecuted, for he would be guilty of a brazen and contemptible theft.

I have read over the transcript of the evidence more than once with an anxious desire to see if there is any real evidence against the defendant. While there are circumstances of suspicion, more than one, I can find nothing that is at all evidentiary of the actual appropriation of the plaintiff's property by the defendant. At the very highest, there is nothing more than a mere scintilla, an adminiculum of evidence; and, while some of the oldest cases decide that an adminiculum of evidence is enough, most Courts have abandoned that view. This matter is well discussed in Wigmore on Evidence, vol. 4, p. 3528, where certain authorities are quoted. So in *James v. Crockett* (1898), 34 N.B. 540; but for us the best authority is the Judicial Committee in *Giblin v. McMullen* (1868), L.R. 2 P.C. 317, in which, at p. 335, their Lordships disapprove of the former rule "that if there were what is called a scintilla of evidence, the Judge was bound to leave it to the jury."

Moreover, the rule against a mere scintilla should be applied even more carefully, if possible, in the case in which a state of facts is alleged that would make the opposite party guilty of a crime: *Lang Shirt Co.'s Trustee v. London Life Insurance Co.* (1928), 62 O.L.R. 83, affirmed in *London Life Insurance Co. v. Trustee of the Property of the Lang Shirt Co. Ltd.*, [1929] S.C.R. 117.

I think that the appeal must be allowed with costs, and the action dismissed with costs.

Appeal allowed.

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[APPELLATE DIVISION.]

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March 11.

HENDERSON v. TUDHOPE.

TUDHOPE v. HENDERSON.

Negligence—Motor-vehicles upon Highway—Collision—Fault of Driver of Vehicle Owned by Company—Whether Company Responsible—Statutory Liability Removed by sec. 41 of Highway Traffic Act (19 Geo. V. ch. 68, sec. 9)—Liability at Common Law—Driver an Employee of Company but not Authorised by Person not Agent of Owner for that Purpose—Position Taken by Counsel at Trial Changed upon Appeal—No Estoppel—Costs.

The effect of the Highway Traffic Amendment Act, 1929, 19 Geo. V. ch. 68, sec. 9, repealing sec. 41 of the Highway Traffic Act, R.S.O. 1927, ch. 251, and substituting a new sec. 41, is to reduce the responsibility of the owner of a motor-vehicle to that at the Common Law.

In the absence of authority to the driver of a vehicle to entrust another employee with the duty of driving it, the owner is not responsible for the negligence of the substituted driver.

Beard v. London General Omnibus Co., [1900] 2 Q.B. 530, followed.

If the act which was done by a person who ought not to have done it, was not done by reason of any act of negligence on the part of the person authorised to do the act, it must be proved that the person who did the act was the agent of the master in doing it.

Dictum of Buckley, L.J., in *Ricketts v. Thos. Tilling Ltd.*, [1915] 1 K.B. 644, at p. 648, followed. That case distinguished upon its facts.

In June, 1929, a collision took place upon a highway between two motor-vehicles, one driven by H., and the other, the property of the C. company, by T., an employee of that company. An action was brought by H. against T., one D., and the C. company, and a cross-action by T. and the C. company against H. The actions being tried together, the trial Judge found that T. was wholly to blame for the collision, and exonerated H., giving judgment against T. (which was affirmed upon appeal), and also against the C. company, by reason of what was taken for granted as the statutory law, the Judge and counsel apparently not being aware of or having forgotten the amendment. D. was an employee of the C. company and was entrusted with that company's motor-vehicle for use in the company's business. D. allowed T. to drive the vehicle, also upon business of the company. The collision occurred when T. was driving; D. was not in the vehicle; and there was nothing to indicate that T. was not a competent driver—he had no licence at the time, but had had one and had driven one of the company's motor-vehicles at one time. Negligence of D. in authorising T. to drive the vehicle was not shewn, and it was not "proved that the person who did the act was the agent of the master in doing it."—

Held, therefore, upon appeal by the company, that there was no liability on the part of the company at the Common Law.

At the trial, counsel for the company, at the opening of the argument, said that he would not contend that the company was not liable for the negligence of T.; the argument proceeded on that understanding; and judgment was pronounced without any consideration of that point. This position taken by counsel did not prevent any evidence being given:—

Held, that there was no estoppel preventing the company from asserting its legal rights, nor was it precluded from doing so on any principle of law; counsel was not precluded in the appellate court from changing his position and relying upon the law as it actually existed; and the company was freed from liability by the statutory amendment.

Costs should depend upon the circumstances of the case and the conduct of the parties: the company was in law responsible for the statement of its counsel, and so was not allowed costs of its appeal; H. should not have opposed the appeal of the company, and so was not allowed the costs of it.

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APPEAL by E. & S. Currie Ltd., a defendant in the first action, and an appeal by Tudhope, defendant in the first action and plaintiff in the second, from the judgment of WRIGHT, J., at the trial of the two actions together. The actions arose out of a collision of motor-vehicles upon a highway. The facts are stated in the judgment.

February 28. The appeals were heard by RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

R. S. Robertson, K.C., for the appellant company.

J. W. Thompson, for the appellant Tudhope.

R. S. Hays, for Henderson, respondent.

March 11. The judgment of the Court was read by RIDDELL, J.A.:—These two appeals were heard, as the actions were tried, together. On the 12th June, 1929, a collision took place between two automobiles, one of them driven by Henderson, the other, the property of the E. & S. Currie Ltd., driven by their employee, Tudhope. The two actions were brought, Henderson in his action claiming against the Currie company, as well as against the driver of the company's automobile, Tudhope, and one Drage, and Tudhope and the Currie company against Henderson.

At the trial, the learned trial Judge, Mr. Justice Wright, placed the blame for the accident upon Tudhope, wholly exonerating Henderson, as well as Drage, who was in another car and was joined as a defendant in Henderson's action. By reason of what was taken for granted as the statutory law, judgment was also given against the Currie company.

An appeal was taken by Tudhope and also by the Currie company. Tudhope's appeal cannot succeed: in my opinion, the learned trial Judge was right in his findings, and they cannot be disturbed.

As to the appeal of the Currie company, wholly different considerations arise: the Highway Traffic Amendment Act of 1929, 19 Geo. V. ch. 68, sec. 9, having repealed the former sec. 41 of the Highway Traffic Act, R.S.O. 1927, ch. 251, and substituted a new sec. 41, which makes the responsibility of the owner of an automobile much lower—the section reading thus:—

"41. The owner of a motor-vehicle shall incur the penalties provided for any violation of this Act or of any regulation made by the Lieutenant-Governor in Council, unless at the time of such violation the motor-vehicle was in the possession of some person

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other than the owner or his chauffeur, without the owner's consent, and the driver of a motor-vehicle not being the owner shall also incur the penalties provided for any such violation."

There is no necessity to appeal to the maxim *Expressio unius, exclusio alterius*, to see that so far as there is liability in a case of the present kind, the responsibility of the owner is reduced to that at the Common Law.

Looking now at the facts, it appears that Tudhope was an employee, a travelling salesman, of the Currie company, who was at Stratford on the company's business, and wished to go to Goderich also on their business, as did Drage, also a salesman of the company. One Williams, an employee of another establishment, wished also to go to Goderich. Drage had driven a car belonging to his employer to Stratford, and it was arranged that the three travellers should go to Goderich together. Tudhope took the wheel of one car, that of the company, the others not being with him. As a consequence of his determination to drive, the accident in question took place, with the result that he was found at the trial to be the sole offender. Tudhope had driven one of the company's cars the preceding summer; he had had a licence for 1928 but had failed to renew it, and had none when the accident happened; on the Monday he had met Drage in Guelph, spent that night with him in Kitchener, having apparently gone with him in his car from Guelph to Kitchener, and at all events going with him in his car from Kitchener to Stratford on the following day, and spending the night with him in Stratford—he, not being entrusted with a car, utilised that entrusted to and driven by his fellow-employee, Drage. As we have seen, when they proposed on the Wednesday to go to Goderich together, Tudhope took the wheel for the first time. Drage went with Williams in the latter's car and had nothing to do with the accident.

The law in such a case is clearly laid down in *Beard v. London General Omnibus Co.*, [1900] 2 Q.B. 530: the servant of the company driving its omnibus allowed another employee to drive; he was negligent and caused an accident: it was held that, in the absence of authority to the driver to entrust another employee with the duty of driving the omnibus, the company was not liable. This case is not at all shaken or questioned in the later case of *Ricketts v. Thos. Tilling Ltd.*, [1915] 1 K.B. 644, in which, under much the same circumstances, the company was held liable, the driver being considered negligent in allowing the other employee to drive. That case is wholly distinct from the present—here there was nothing to indicate that Tudhope was

not a competent driver; and there, too, the driver sat beside the other, as in this case he did not.

Nor do the cases quoted in the *Ricketts* case at all indicate liability, in the facts of the present: *Engelhart v. Farrant & Co.*, [1897] 1 Q.B. 240; *Gwilliam v. Twist*, [1895] 2 Q.B. 84, 11 Times L.R. 415.

I accept as law the test laid down by Buckley, L.J., in *Ricketts v. Thos. Tilling Ltd.*, *ut supra*, at p. 648:—

“If the act which was done by a person who ought not to have done it, was not done by reason of any act of negligence on the part of the person authorised to do the act, then it must be proved that the person who did the act was the agent of the master in doing it.”

Here Drage was authorised to drive the car, and be authorised Tudhope to drive it in his stead; if Drage was guilty of negligence in so authorising Tudhope to drive the car, it might be that the company would be liable; but no negligence of the kind appears; and “it must be proved that the person who did the act was the agent of the master in doing it.” This was not so much as attempted to be proved, it being thought that the ownership of the car was sufficient to fix the company with liability if its car did the mischief.

I do not think it necessary to elaborate on the proposition that the fact of Tudhope being in the employ of the company makes no difference—that was so in the *Beard* and the *Ricketts* cases, just cited. In the former, the argument that the actual driver was “a servant of the defendants, sent out by them in partial charge of the omnibus” (p. 531) was of no avail. Nor do I quote from such cases as *Gwilliam v. Twist*, *supra*, and *Thomas v. Canadian Pacific Railway Co.* (1906), 14 O.L.R. 55 — the whole doctrine is admirably discussed in Smith’s *Master and Servant*, 7th ed., in ch. 5.

There being, then, no liability on the part of the master at the Common Law, and the statutory liability on the part of the owner being removed by the recent legislation quoted above, there remains to be considered the effect, if any, of what was said by counsel for the company at the trial. An affidavit was filed by the solicitor for Henderson; but, while we allowed it to be filed, it was agreed that, since there was not an agreement in respect of what was said, we should ask the learned trial Judge as to it, all parties being content that we should take his statement as the precise truth and the basis of our decision. Mr. Justice Wright has courteously acceded to our request and writes me as follows:—

“ . . . at the opening of the argument . . . I asked

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App. Div. counsel for the defendant E. & S. Currie Ltd. if he
 1930. would contend that the owner of the car, E. & S. Currie Ltd., was
 not liable for the negligence of the defendant Tudhope
 HENDERSON he answered that he would not make that contention, and the
 v. argument proceeded on that understanding and judgment was
 TUDHOPE. pronounced without any consideration of that point.”
 Riddell, J.A.

It is perfectly apparent—and, indeed, is admitted on all hands—that the legislation, which had come into force a few months before, was not present to the minds of counsel, and was not pressed in argument. It is not, however, contended that this position taken by counsel for the company had the effect of preventing any evidence being given, or any effect at all except relieving counsel for Henderson from arguing and the trial Judge from considering the effect of this legislation.

Consequently there is no estoppel preventing the company from asserting its legal rights.

Nor, as I think, is it precluded from doing so on any principle of law. No doubt, the parties to an action not involving the rights of others, in which no infant is concerned, no public interest concerned, may agree that their case is to be decided upon any law they see fit—*Quilibet renunciare potest jure pro se introducto*—the Judge may, indeed, decline to act upon the agreement, and the parties may find that, if he does act, he is in law but an arbitrator; but, if he does act and gives a decision on the agreed basis, the parties cannot complain: *Re Naubert* (1919), 46 O.L.R. 210. Were that this case, the appellant company might find itself in evil shape; and any appeal might well be dismissed on that ground alone. But this is not the situation; there was no intention that the case should be decided except on the existing law, whatever it was; and the whole incident is just an instance of want of knowledge or temporary forgetfulness on the part of counsel.

While I cannot point to any reported case in our own Courts, I was personally concerned as counsel in a case in which opposing counsel agreed with my statement of the law, which admission resulted in a verdict against him; on his taking an appeal, he stated that he had misunderstood the law, and the Court of Queen's Bench declined to give effect to my objection that he was precluded from changing his position and relying upon the law as it actually existed. This decision, known as it is to me, does not bind this Court or any member of it; but I think it is sound sense and should be followed. If there ever was any rule depriving a litigant of his legal rights because his counsel made a mistake as to the law, it should not be applied in a jurisdiction in

which the Court is not a kind of arena for a game in which the cleverest man wins, the Judge sitting as a sort of umpire to see that the prescribed rules are preserved; but a business institution created by the people to give their rights according to law to those resorting to them; and not binding itself by any hard and fast rules which will prevent justice being done. I see no objection to the company now asserting rights not pressed or even asked for at the trial, and the appeal so far as it is concerned should be allowed.

It has always been considered, and rightly so, as I think, that costs should depend, to a certain extent at least, upon the circumstances of the case, and that the conduct of the parties is of great significance in the consideration of costs. This appeal would never have been heard of but for the statement of the company's counsel, for which the company is in law responsible; the company, then, cannot be awarded the costs of this appeal; on the other hand, the plaintiff Henderson should not have opposed the appeal of the company at all, as he was clearly in the wrong. So he should not have costs.

The result is that the appeal of Tudhope is dismissed with costs and that of the company is allowed without costs.

Order accordingly.

[MIDDLETON, J.A.]

SOLLOWAY MILLS & Co. LTD. v. WILLIAMS.

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March 11.

Criminal Law—Search-warrant—Issue by Magistrate in Alberta for Execution in Ontario—Endorsement by Ontario Magistrate—Seizure of Documents under—Action against Magistrate and Constables Making Seizure—Stay of, as against Constables—Public Authorities Protection Act, R.S.O. 1927, ch. 120, secs. 8, 10—Criminal Code, sec. 629—"Some other Country or Territorial Division"—Execution of Process in any Part of Dominion.

Documents were seized in the premises of the plaintiffs in the Province of Ontario under a search-warrant signed and issued by a police magistrate in and for the Province of Alberta, and endorsed by the defendant W., a justice of the peace and police magistrate in and for the Province of Ontario. This action was brought against the Ontario magistrate and the constables who executed the warrant to restrain them from doing anything further with the documents seized and particularly from removing them from Ontario:—

Held, that, production, perusal, and a copy of the warrant having been demanded by the plaintiffs and furnished to them, their remedy, if aggrieved, was against those issuing the warrant; and the action

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as against the constables was stayed by an order made upon summary application: secs. 8 and 10 of the Public Authorities Protection Act, R.S.O. 1927, ch. 120.

The words "some other county or territorial division" in sec. 629 (2) of the Criminal Code are not confined to some other county or division of the Province in which the warrant is issued; and process may be executed in any part of the Dominion.

Section 629 enables the Crown, when it deems it necessary in the interests of the administration of justice, to take possession at once of documents which it is believed will afford evidence of guilt and secure them beyond the risk of loss or tampering.

And the action against the magistrate was dismissed.

MOTION by the plaintiffs for an order directing the defendants to return to the premises of the plaintiffs all papers seized under a search-warrant signed by a police magistrate in and for the Province of Alberta, and endorsed by the defendant Williams, a justice of the peace and police magistrate in and for the Province of Ontario, and acted upon and executed by his co-defendants, constables, and for an order restraining the defendants from doing anything further with certain books and papers seized under the search-warrant, and particularly from removing such papers and documents from the Province of Ontario, and for a declaration that all proceedings taken under the said search-warrant are invalid in that there is no jurisdiction on the part of the magistrate in Alberta to issue the search-warrant, or on the part of the magistrate in Toronto to endorse the same.

There was also a motion by the defendants for an order directing that the action be stayed and setting aside the proceedings so far as the defendant constables are concerned, upon the ground that the action is prohibited by the provisions of the Public Authorities Protection Act.

The motions were heard in the Weekly Court, Toronto.

R. H. Greer, K.C., for the plaintiffs.

A. W. Rogers, for the defendants.

March 11. MIDDLETON, J.A.:—The defendants' motion clearly must succeed. By the Public Authorities Protection Act, R.S.O. 1927, ch. 120, sec. 10, no action shall be brought against a constable for anything done in obedience to a warrant issued by a justice of the peace until demand has been made for the production, perusal, and a copy of the warrant. Production, perusal, and copy of warrant were duly demanded and furnished, and the remedy of the plaintiffs, if aggrieved, is then against those issuing the warrant.

Section 8 of the same Act provides that "if an action is brought where by this Act it is enacted that no action shall be brought

it may be stayed upon a summary application." I therefore stay this action so far as these defendants are concerned, and direct that the plaintiffs do pay the costs of this application.

So far as the defendant Williams is concerned, the question raised is one of importance and by no means free from difficulty. It is said that the plaintiffs have committed in the Province of Alberta an offence against the laws of Canada. The plaintiffs also carry on business in the Province of Ontario. The Crown alleges that certain books, papers, and documents in the plaintiffs' place of business in Ontario, will afford evidence as to the commission of the offence in Alberta. The magistrate before whom the proceedings are pending in Alberta issued his warrant under sec. 629. of the Criminal Code* and sent it for execution into Ontario, and the defendant Williams, as justice of the peace and police magistrate, endorsed the warrant in pursuance of sec. 629(2), and in pursuance of such endorsement the premises of the plaintiffs have been entered and the books, papers, and documents in question have been taken.

The question which arises is, does the section of the Code relied upon authorise a justice of any Province to endorse the warrant, or is the action of the Alberta justice limited to the Province of Alberta only? This depends upon what is meant by the words of the section which authorise the endorsement of the warrant where the thing sought "is reputed to be . . . in some other county or territorial division." Does that mean some other county in the same Province? I can find nothing which justifies the

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* 629. Any justice who is satisfied by information upon oath in form 1, that there is reasonable ground for believing that there is in any building, receptacle, or place,

(a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed;

(b) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or

(c) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant;

may at any time issue a warrant under his hand authorising some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division to be by him dealt with according to law.

2. If the building, receptacle, or place in which such thing as aforesaid is reputed to be is in some other county or territorial division, the justice may nevertheless issue his warrant in like form modified according to the circumstances, and such warrant may be executed in such other county or territorial division upon being endorsed by some justice of that county or territorial division, such endorsement to be in form 2A, or to the like effect.

Middleton, giving of a narrow meaning to the words used. "Territorial
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division" is defined by the interpretation clause as including any county, union of counties, etc., or other judicial division or place to which the context applies, and so throws no light. In another section of the statute, where it is intended to limit the effect of the proceedings to the provincial boundaries, it is clearly indicated by the enacting clause. It is not hard to see why, with respect to the particular matter dealt with by sec. 629, the Parliament of Canada may well have intended process to be executed in any part of the Dominion.

Mr. Greer suggests that the documents might be secured for the purpose of evidence by the issue of a subpoena, but this would clearly not meet what is aimed at. Books have been known to disappear when wanted. They are easily tampered with. The idea underlying the statute is that the Crown should be able, when it deems it necessary in the interests of the administration of justice, to take possession at once of that which it is believed will afford evidence of guilt and secure it beyond the risk of loss or tampering.

I think the proper disposition of this motion is to turn it into a motion for judgment and to dismiss the action with costs.

I have not overlooked other difficulties in the plaintiffs' way, for example, the question as to the right of the civil courts to interfere in the administration of criminal justice. I refrain from discussing these, as it is not necessary in the view that I take of the main question.

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DONOVAN v. CITY OF BELLEVILLE.

March 12, *Municipal Corporations—Contract for Paving Street—Resolution of City Council Accepting Tender—Necessity for By-law—Rescission of Resolution—Action for Breach of Alleged Contract—City Corporation not Bound—Resolution merely Expressive of Willingness to Enter into Contract.*

In Ontario, when a municipal council is acting under the Municipal Act, its powers must be exercised by by-law unless it is otherwise expressly authorised.

John Mackay & Co. v. Toronto Corporation, [1920] A.C. 208, followed. A resolution was passed by a city council on the 10th September, 1929, recommending that the plaintiff's "tender be accepted for the paving of C-road at a cost of \$12,843." The city clerk advised the plaintiff by letter of the recommendation.

At a later hour on the same day, the council passed a by-law, under the Local Improvement Act, "to authorise the construction of" a pavement on C-road, and authorising the mayor and clerk "to

cause a contract to be made and entered into with some person or persons, firm or corporation, subject to the approval of the council to be declared by resolution."

No formal contract was entered into with the plaintiff; and the council on the 30th September, 1929, passed a resolution purporting to rescind the former resolution and accepting another tender:—

Held, that the resolution of the 10th September, by itself, did not create a contract between the plaintiff and city corporation—it must be construed as a mere expression of willingness to enter into an agreement with the plaintiff that he should do the work at the price offered, or as an authority to the mayor and clerk to enter into a formal contract with the plaintiff at that price; and the plaintiff's action for breach of contract was dismissed.

Review of the authorities. *Ponton v. City of Winnipeg* (1908), 41 Can. S.C.R. 18, specially referred to.

ACTION by John J. Donovan for damages for breach of a contract alleged to have been entered into between him and the Corporation of the City of Belleville.

March 7. The action was tried before LOGIE, J., without a jury, at Belleville.

E. J. Butler, K.C., and *C. A. Payne*, for the plaintiff.

A. Bernard Collins, for the defendant corporation.

March 12. LOGIE, J.:—On the 27th August, 1929, the Council of the City of Belleville passed a recommendation that tenders for paving Cannifton-road from Station-street to College-street be called for on the 10th September, 1929. The types of pavement were to include asphalt, bitumens, and amiesite. On the 4th September, advertisements were published calling for tenders, the lowest or any tender not necessarily accepted, and advising that plans and specifications were to be obtained at the city engineer's office. On the 10th September, at a special meeting of council, tenders were received, of which the plaintiff's was the lowest, and on the same day a resolution was passed as follows:—

"Recommended that the tender of John Donovan be accepted for the paving of Cannifton-road at a cost of \$12,843."

At a later hour on the same day, the council passed by-law No. 2917, under the provisions of the Local Improvement Act, R.S.O. 1927, ch. 235, "to authorise the construction of an asphalt pavement on macadam base together with kerb, all necessary storm sewers, etc., on Cannifton-road from Station-street to College-street."

On the 11th September, the city clerk sent to the plaintiff a letter in the following words:—

"I beg to advise you that at the special meeting of the city council held last evening the following recommendation was passed.

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Owing to the property-owners on Cannifton-road asking for a hot mixed asphaltic concrete wearing surface instead of the macadam pavement, the matter was reconsidered by council, and, after some negotiations with the plaintiff, the council on the 30th September recommended that the former resolution in regard to the paving contract for Cannifton-road be rescinded and that the tender of Godson Contracting Company for the three-inch asphaltic concrete pavement for \$15,536.20 be accepted, and that the mayor and clerk be authorised to sign a contract for the same; on the 1st October the city clerk sent a letter to the plaintiff embodying the last resolution; and on the 7th November the writ was issued in this action.

By-law No. 2917 contains the following clause:—

"(4) The mayor and clerk are authorised to cause a contract for the construction of the work to be made and entered into with some person or persons, firm or corporation, subject to the approval of this council to be declared by resolution."

A blank copy of the form of the proposed contract between the contractor and the corporation was referred to in the instructions to bidders, and was laid before all the contractors, including the plaintiff, and they were advised to study it and were informed by the instructions that the successful tenderer would be required to sign it.

No formal contract was entered into with the plaintiff, but he contends that his tender was duly accepted, that there was a contract subsisting between him and the defendant corporation for the work, and that the defendant corporation has committed a breach of this contract whereby he has suffered damage.

Although in certain other Provinces of Canada certain powers of a municipality are required to be exercised by by-law, other powers may be exercised by by-law or resolution, and others again by resolution alone; in Ontario, when a council is acting under the Municipal Act, its powers must be exercised by by-law unless otherwise expressly authorised or provided for. This has been finally decided in *John Mackay & Co. v. Toronto Corporation*, [1920] A.C. 208.

If the contract, a draft of which had been submitted to the plaintiff, had actually been executed by both parties, it may be that clause 4 of the by-law would have been a sufficient authorisation under the Municipal Act, and the resolution of council recommending that the plaintiff's tender be accepted might have been, though such resolution anticipated the actual execution of the docu-

ment and the by-law itself, an approval by the council required by this clause of the by-law. The resolution of the 10th September, however, by itself had no effect in setting up a contract between the parties. It must be construed as a mere expression of the willingness of the members of council to enter into an agreement with the plaintiff to do the work at the price offered, and thus would not bind the corporation, or else as an authority to the mayor and clerk to enter into the formal contract with the plaintiff at that price. Even if the resolution had been more definite and had said "that the tender of John Donovan be and the same is hereby accepted," etc., etc., it would still have been ineffective to constitute a binding contract, although communicated to the plaintiff. It was only a preliminary step leading up to a formal contract, the formal contract contemplated by both parties.

I have not overlooked the cases cited by counsel, and I can find no case exactly in point as to the power of a municipal corporation which must exercise its powers by by-law to enter into a contract for work authorised by a by-law by means of a resolution. I do not say that this cannot be done. Each case must be decided on the terms of the Act constituting the municipal corporation, of the particular by-law, and its own facts. In the *Mackay* case there was no by-law and no resolution. In *District of North Vancouver v. Tracy* (1903), 34 Can. S.C.R. 132, the plaintiff offered to purchase lands which the municipality had bid in at a tax sale and to pay therefor the amount of "the arrears of taxes and costs." The council resolved to accept "the amount of taxes, costs, and interest," and the case went off on the variation between the offer and the acceptance. It was argued in the *Tracy* case that the resolution was passed by virtue not only of the statute but also of the by-law authorising the tax-sale, which was under seal, and, as the council might under the British Columbia Act act by resolution, this resolution had the same effect as if it was also under seal. No authority was cited for this proposition and it was not referred to in the judgment.

In *Ponton v. City of Winnipeg* (1908), 41 Can. S.C.R. 18, another case of a land tax-sale, it was held that where a section of the city charter was express that the powers of the council should be exercised by by-law when not otherwise authorised or provided for, and there was no provision authorising it to sell land by mere resolution, a by-law was essential, and lacking this the alleged contract was inoperative. This is the nearest case to the case at bar that I can find.

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In *Rex ex rel. LaFleche v. Sheppard* (1915), 24 D.L.R. 404, it was held that a resolution of the Municipal Corporation of the City of Edmonton authorising a contract with the corporation for gas-drilling operations, which if satisfactory were later to be taken over by the municipality, was a mere expression of willingness to contract, but not necessarily a contract in itself. The decision was based upon the fact that the resolution itself clearly contemplated a formal agreement to carry into effect the proposal submitted to the council.

The case at bar is not unlike the "subject to contract" cases such as *Chillingworth v. Esche*, [1924] 1 Ch. 97; *Rosssdale v. Denny*, [1921] 1 Ch. 57; *Wilson v. Balfour* (1929), 45 Times L.R. 625; and *Stowe v. Currie* (1910), 24 O.L.R. 486.

The action is dismissed with costs.

[APPELLATE DIVISION.]

RAMSAY V. STEEL CO. OF CANADA LTD.

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Company—Shareholders—Ordinary and Preferred Shares—Dividends—Provisions of Letters Patent Incorporating Company—Construction—Ratable Equality—Certificates for Shares—Declaration as to Respective Rights of both Classes—Estoppel.

The judgment of ORDE, J.A. (1929), 64 O.L.R. 327, was affirmed on appeal (HODGINS and GRANT, JJ.A., dissenting).
 Review of the authorities.

AN appeal by the defendant company from the judgment of ORDE, J.A. (1929), 64 O.L.R. 327.

November 25, 26, 27. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

W. N. Tilley, K.C., and C. F. H. Carson, for the appellant company. The provision of the letters patent, "after the holders of ordinary shares shall have received dividends equal to those paid on the preference shares," is a yearly provision and is governed by the words "from time to time." The distribution of dividends from time to time is from the fund available at the time of distribution, i.e., the fund consisting of profits at that time, having no reference to the lump sum earned and divided previously. The equality of the shareholders arises at the time of distribution as the condition of the fund at that time permits. If the directors have to divide the fund, there is no right or au-

thority to allocate surplus funds to shareholders of 10 years back, who at that time were not entitled to any dividends because none were available for distribution. The dividend is paid from the fund that the directors have determined to distribute, i.e., the amount "available for dividends." *In re Crichton's Oil Co.*, [1901] 2 Ch. 184, [1902] 2 Ch. 86; *In re Spanish Prospecting Co. Ltd.*, [1911] 1 Ch. 92, at p. 98. The provisions of the Companies Act, as it was in 1910, when the charter of the company was issued, govern: R.S.C. 1906, ch. 79. The right to include in the letters patent a reference to preference shares under sec. 8 comes from the right of the company to pass by-laws. Anything so incorporated is not subject to repeal by by-law of the company. Under secs. 47, 48, and 49, preference shareholders may be given priority when the fund shall be distributed; but, apart from that, all shares, preference and common, must be placed on an equal basis when the distribution is made, i.e., at the time of the distribution it must be a "ratable participation." The Companies Act, R.S.C. 1927, ch. 27, sec. 56, gives the company additional power to deal with other matters than preferences and priorities; but, that not being the law in 1910, the company had only power to deal with preferences and priorities. *Henry v. Great Northern Railway Co.* (1857), 1 DeG. & J. 606, *Corry v. Londonderry and Enniskillen Railway Co.* (1860), 29 Beav. 263, and *Allen v. Londonderry and Enniskillen Railway Co.* (1877), 25 W.R. 524, are to be distinguished, because under our Act there is no power to grant special rights and privileges in respect of the common shares, and therefore they cannot be cumulative. The presumption under our Act is a ratable distribution at the time of distribution, subject to the priority of the preference shares for the preferential amount. The ambiguous part of the charter is from "time to time," and therefore we are entitled to look at the endorsement on the certificates as being a reasonable, business-like, practical, and usual interpretation, as understood by every one at that time, that the phrase meant "annually." Reference to *In re Espuela Land and Cattle Co.*, [1909] 2 Ch. 187; *Will v. United Lankat Plantations Co. Ltd.*, [1914] A.C. 11; *In re National Telephone Co.*, [1914] 1 Ch. 755; *In re New Chinese Antimony Co. Ltd.*, [1916] 2 Ch. 115; *In re Springbok Agricultural Estates Ltd.*, [1920] 1 Ch. 563; *Anglo-French Music Co. Ltd. v. Nicoll*, [1921] 1 Ch. 386; *J. I. Thornycroft and Co. Ltd. v. Thornycroft* (1927), 44 Times L.R. 9; *Collaroy Co. Ltd. v. Giffard*, [1928] 1 Ch. 144; *In re Fraser and Chalmers Ltd.*, [1919] 2 Ch. 114.

R. S. Robertson, K.C., and *L. V. Sutton*, for the plaintiffs,

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respondents. An ordinary shareholders' dividend is not a distribution of the net profits of the company for a particular time. All shareholders must share equally unless there is an express provision to the contrary: *Guinness v. Land Corporation of Ireland* (1882), 22 Ch.D. 349, at p. 377. The language of the letters patent, "7 per cent. per annum" does not mean that the payment shall be made annually, it means that the interest will be calculated at 7 per cent. per annum: *Webb v. Earle* (1875), L.R. 20 Eq. 556. The charter cannot be read as meaning that the words "7 per cent. per annum" require a dividend to be paid yearly: *Staples v. Eastman Photographic Materials Co.*, [1896] 2 Ch. 303; *Eving v. Israel and Oppenheimer Ltd.*, [1918] 1 Ch. 101. Dividends are not confined to any particular period of time: *In re Wakley*, [1920] 2 Ch. 205; *In re Sale*, [1913] 2 Ch. 697. There is no evidence to shew that the ordinary shareholders had read the letters patent or that they even had an opportunity to read their provisions. The shareholders were not misled by the ambiguity of the letters patent, and so reference cannot be had to the stock certificates in order to ascertain what was intended in the charter. A new contract between the shareholders and the company does not arise when the shareholder obtains his stock certificate: *Lamont v. Canadian Transfer Co. Ltd.* (1909), 19 O.L.R. 291. The share certificates are not to be read along with the letters patent, as they are not contemporaneous: *Bank of New Zealand v. Simpson*, [1909] A.C. 182, at p. 188. Evidence of surrounding circumstances can only be given if there is ambiguity. The words of the letters patent are clear, so reference cannot be had to the share certificates. Reference to *J. I. Thornycroft and Co. Ltd. v. Thornycroft*, 44 Times L.R. 9; *Ashbury v. Watson* (1885), 30 Ch.D. 376; *Crawford v. North Eastern Railway Co.* (1856), 3 K. & J. 723, at p. 733.

Tilley, K.C., in reply. If there is no provision in the letters patent directing that the preferred shareholders are to get the dividend from a particular source, they get it from the general profits of the company: the *Crawford* case, *supra*. It is not within the powers of the directors of the company to give the common shareholders a portion of the net profits while there are arrears of dividends on the shares held by preferred shareholders. In any one year the common shareholders are not entitled to anything until the preferred shareholders have been paid 7 per cent. on their shares. The common shareholders cannot now set up that they are not bound by the conditions on the share certificates. A great many of them have held their stock certificates for a period of 18 years, and they cannot now state that they have certain rights

under the charter. They did not know what these rights were when they obtained their share certificates, and they did not find out what they were during the 18-year period. By the supplementary letters patent the old rights of the shareholders were preserved, therefore the shareholders are still bound by their share certificates.

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March 17, 1930. MULOCK, C.J.O.:—This is an appeal by the defendants from the judgment of Orde, J.A. The sole question involved in this action is, what (after payment of a fixed cumulative preferential dividend at the rate of 7 per cent. per annum on the capital paid up on the preference shares and after the maintenance of the reserve fund hereafter mentioned) are the rights of the holders of preference shares and the holders of ordinary shares respectively in respect of any balance of net profits of the company from time to time declared by the directors for distribution as dividends amongst the shareholders?

The holders of preference shares contend that any dividend declared by the directors is to be deemed a dividend for a year, and that after payment thereof to each holder of ordinary shares of a sum equal to one year's dividend of 7 per cent. per annum on the amount paid up on his ordinary shares, the remainder, if any, is divisible ratably between the two classes of shareholders.

The holders of ordinary shares claim to be entitled to receive dividends equal in gross amount to those paid to the holders of preference shares before the latter become entitled to anything beyond 7 per cent. per annum computed from the time when they paid up for their shares.

The holders of preference shares have been paid dividends at the rate of 7 per cent. per annum on their shares during all the years of the company's existence. The holders of ordinary shares have not, the total amount of dividends paid to each holder of ordinary shares being $43\frac{1}{2}$ per cent. less than that paid to each holder of preference shares.

The company was incorporated by letters patent dated the 8th day of June, 1906, under the Companies Act, R.S.C. 1906, ch. 79, and shortly thereafter it began and has ever since continued in business. The letters patent contain the following provisions:—

"The capital stock of the said company shall be \$25,000,000, divided into 250,000 shares of \$100 each, subject to the increase of such capital stock under the provisions of the said Act of which 250,000 shares, 100,000 shares of \$100 each, that is to say, \$10,000,000, be created and issued as preference stock, and the same when so issued shall have preference and priority as follows:—

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“(a) In case of liquidation, dissolution or winding-up of the company, the holders of such shares shall be entitled to repayment in preference to ordinary shareholders of the amount of the par value of said shares and any arrears of dividends thereon, and also the net profits of the company which it shall from time to time be determined to distribute are to be applicable first to the payment of a fixed cumulative preferential dividend at the rate of 7 per cent. per annum on the capital paid up on the said preference shares, and the holders of such shares shall participate ratably with the holders of the issued ordinary shares in the distribution of net profits after the holders of the ordinary shares shall have received dividends equal to those paid on the preferred shares.

“(b) No dividends shall be paid on the ordinary shares until after the company shall have created and have to the credit of a reserve fund a sum equal to at least one year's dividend on the then issued preference shares.”

The letters patent declaring that the holders of preferential shares are to be entitled to “payment of a fixed cumulative preferential dividend at the rate of 7 per cent. per annum,” but for what follows they would be entitled to nothing further (*Will v. United Lankat Plantations Co. Ltd.*, [1914] A.C. 11), and the whole remainder of net profits when declared for distribution would go to the holders of ordinary shares. But the letters patent declare that the holders of preference shares shall be entitled to share ratably with the holders of ordinary shares “after the holders of the ordinary shares shall have received dividends equal to those paid on the preference shares.”

The meaning of these words appears to me free from any ambiguity and perfectly plain. In my opinion, the holders of ordinary shares are entitled to be paid dividends equal in amount to all those paid to the holders of preferred shares before the latter become entitled to participate further.

Mr. Tilley sought to give to the word “dividends” a meaning of which, in my opinion, it is not susceptible. He argued that the word “dividends” means yearly dividends, and that when (there being no arrears) the preferred holders received in any year their fixed yearly dividend of 7 per cent. and the ordinary shareholders received 7 per cent. on their paid up capital, the latter had received “dividends equal to those payable on the preferred shares,” and that thereupon the preferred shareholders became entitled to participate ratably with the ordinary shareholders in the balance available for distribution.

The contract between the company and the shareholders is

created by the letters patent. They speak of dividends, not yearly dividends, and there is, I think, no justification for reading into them words that might modify their plain and real meaning. Section 80 of the Companies Act, R.S.C. 1906, ch. 79, says that "the directors . . . may, from time to time, make by-laws . . . as to the following matters: . . . (b) The declaration and payment of dividends."

The statute does not speak of dividends having relation to any period of time. The directors may declare dividends at regular or irregular periods, monthly, quarterly, yearly, or otherwise, or not at all, according to the condition of the company's affairs. The payment of a dividend, in my opinion, merely means a distribution of net profits having regard to the then state of the company's affairs and not to any period of time: *Henry v. Great Northern Railway Co.*, 1 DeG. & J. 606, 637; *Allen v. Londonderry and Enniskillen Railway Co.*, 25 W.R. 524; *Crawford v. North Eastern Railway Co.*, 3 K. & J. 723, 736.

I agree with the trial Judge that "the equality intended to be given to the ordinary shareholders before the preferred shareholders can participate is . . . a ratable equality in dividends to all 'those' theretofore 'paid on the preferred shares,' and not merely an equality to the particular preferred dividend then declared" (64 O.L.R. at pp. 340, 341.)

It was also argued for the defendants that the language of the letters patent as to the preferred shareholders being entitled to participate in dividends after payment of their 7 per cent. should be interpreted having regard to a certain stock certificate issued by the company. It appears that, shortly after the allotment of shares to both classes of shareholders, the company issued to each shareholder a stock certificate worded as follows:—

"The preference shares carry a fixed cumulative preference dividend payable out of the profits of the company applicable to dividends at the rate of 7 per cent. per annum on the capital paid up thereof. They rank both as to dividends and assets in priority to all ordinary shares. If, after providing for the payment in any year of the dividend on the preference shares and any balance due for cumulative dividends for preceding years, there remain any surplus net profits, any and all such as are not in the opinion of the directors required for the purpose of the company will be applicable to dividends on the ordinary shares for such year to the extent of but not exceeding 7 per centum on the capital paid up thereon when and as from time to time the same may be declared by the directors. The remainder of any such surplus net profits shall then be applicable to the payment of further dividends

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equally per share upon both the preference shares and the ordinary shares, but no dividends shall be paid on the ordinary shares until after the company shall have created and have to the credit of a reserve fund a sum equal to at least one year's dividend on the then issued preference shares, the whole as provided in the letters patent incorporating the company."

There was no by-law, resolution, or minute of the directors shewing that they had authorised or approved of this form of certificate. Nor was there anything to shew by what authority it came to be issued. But it continued to be used until the issue of supplementary letters patent on the 16th November, 1928. According to the view which I have above expressed, this certificate does not correctly declare the rights of the holders of preference shares as created by the letters patent, and I agree with the reasons of the learned trial Judge for holding that the rights of the shareholders as declared by the letters patent are not affected by the certificate, and I think this appeal should be dismissed with costs.

The supplementary letters patent of the 16th November, 1928, after subdividing the shares of both classes, contain these words:—

"Reserving and maintaining at all times for the shares of each class, preference and ordinary, all the rights attaching to the shares of the par value of \$100 as originally created."

These words are open to the construction that at the date of the issue of the supplementary letters patent the rights of each class of shareholders in the subdivided shares were to be the same as in the original shares of \$100 each.

I am inclined to the view that such is the meaning of the words in question, and, if that be a correct interpretation of them, then such rights were unaffected by the stock certificate above referred to, upon which the defendants rely.

MAGEE, J.A., agreed with the Chief Justice.

HODGINS, J.A.:—As I view it, the provisions of the charter seem to contemplate, and to be dealing with, a situation arising when the directors are considering a distribution of profits, and they contain a direction indicating the rights of the two classes of shareholders who would be interested therein as to the proposed division.

These profits are such as shall be "determined to be distributed," by the directors, and this determination is to be arrived at "from time to time." The profits so described are to be paid first to the extent of 7 per cent. per annum to the preferred shareholders, such dividend to be a fixed cumulative and preferential one.

Who is to be entitled to what remains is not definitely dealt with, but the right of the preferential shareholders to any part of it is expressly postponed until after the holders of the ordinary shares "shall have received dividends equal to those paid on the preferred shares."

After that event has happened, preference and ordinary shareholders share equally.

There is in these provisions an implication that the surplus of the designated net profits, over and above the 7 per cent. preferred dividend per annum, will be paid to the ordinary shareholders to such an extent that they shall get dividends equal to those paid on the preferred shares. This is to my mind a direction *ad hoc* and refers to the per annum payment, and is to be applied from time to time, and as and when profits are being distributed.

If so read, it amounts to a direction that, if the preferred shareholders receive their stipulated 7 per cent. per annum, they can receive no more of the profits then in process of distribution until the holders of ordinary shares shall have received thereout dividends equal to those which, out of these profits, are paid on the preferred shares, namely, to the extent of 7 per cent. per annum. This interpretation allows full meaning to be given to the expression "holders of ordinary shares" as being those who, as present holders, are properly entitled to a dividend, and the words "paid on the preferred shares" as meaning the "payment" definitely provided for in the same clause, that is, what is directed to be paid per annum out of the net profits, in priority to anything else.

It cannot be denied that the language creates difficulty if not confined to the action of the directors at one time and in relation to one sum of profits then to be distributed by them, and if the reference to the prior charge is not governed by the words "per annum."

If read as if it was to be applied to a continuous course of action, dealing with an uninterrupted flow of profits, and capable of being applied to a changing list of ordinary shareholders, it would produce curious results, requiring it to be ascertained whether the holders of ordinary shares in all previous years had received dividends equal to those paid on the preference shares, and if not who were entitled to the shortage, much as in the case of *First Garden City Ltd. v. Bonham-Carter* [1928] Ch. 53. where such a distribution is held to be specially directed.

Further complications would ensue if there were an increase in the capital in the form of ordinary shares, which would then, on

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one construction of the words "equal dividends," further postpone the right of the preferred shareholders to benefit equally with ordinary shareholders in any surplus over the dividends on each class.

In deciding what is the meaning of the words "shall have received dividends equal to those paid on the preferred shares," three meanings may possibly be given to the word "equal," i.e.: (1) equal in point of the right attached to the senior shares; (2) equal to the dividend in point of amount paid on each occasion when a dividend is paid on the preferred shares; (3) equal in point of the per annum rate.

It seems to me that, unless a dividend is expressly made cumulative and preferred, the right to such dividend must be determined at some specific point of time, when the company can identify the holders of those shares to be benefited, who then are the only ones to be reckoned with. In dealing with a charter which suggests or implies that, when dealing with a specific distribution, equality in any further distribution between preferred and ordinary shares depends upon a condition precedent as here, the Court should lean to a construction which would enable a company to deal finally with its profits on each occasion in which it has determined to declare dividends, as between the different classes of those who are then its shareholders.

The meaning of the clause in question which commends itself to me is equality in the per annum rate, which would produce, under that construction, equality in such distribution of the yearly, half-yearly, or quarterly dividends paid at the 7 per cent. per annum rate. This would be a situation which would accord with business practice, and would work out an equal division of profits between the two classes of shares, giving to each a dividend at the rate of 7 per cent. per annum, and yet preserving priority. Thus construed it would accord with the provisions more clearly stated in the cases of *In re Espuela Land and Cattle Co.*, [1909] 2 Ch. 187, *In re Fraser and Chalmers Ltd.*, [1919] 2 Ch. 114, and *In re National Telephone Co.*, [1914] 1 Ch. 755, where the resolution provided that after the second cumulative preference shares had received their 6 per cent. per annum and after the ordinary shares had received 6 per cent. "out of the profits of each year" there should be equality between the two classes of shares.

A distinction has been drawn in certain cases between the right to be paid a dividend, the extent and rate of which are specified, and, in words or in effect, charged upon capital and surplus in winding-up/ and/ or on the net profits from time to time, with a right arising upon the allocation of profits for dividends to a

certain share thereof. In this case the preference shareholders have the right first mentioned, and by reason of it either a preferential and cumulative charge on the profits is created for their dividend, or there is a contract between the company and the preferred shareholders that it shall be so treated. This I take to be the effect of the original letters patent. But I think the same result would follow if their rights arose only on the setting apart of a specified amount for dividend purposes. See *Ferguson v. Buchanan*, [1920] Sess. Cas. 154; *Bishop v. Smyrna and Cassaba Railway Co.*, [1895] 2 Ch. 265; *Collaroy Co. Ltd. v. Giffard*, [1928] Ch. 144.

The ordinary shareholders have only the second right.

The absence of any charge or declaration of like effect in favour of the ordinary shareholders naturally leads to the conclusion that they had no such right to a cumulative dividend. That is not conclusive, but, having in mind that the rights of preference and priority given to shareholders should be definitely and fully stated in the articles of association or by the contract made when the shares are issued, and that when that is done their rights are established and often definitely limited thereby, it is singular that without any such definite and precise statement ordinary shareholders can acquire exactly similar rights to priority and to (so-called) arrears without anything which can be "so definitely pointed to as to suggest that it contains the whole of what the shareholder is to look to from the company: *per* Haldane, L.C., in *Will v. United Lankat Plantations Co. Ltd.*, [1914] A.C. 11.

They cannot go back to previous periods and claim a present right to a sum equal to any cumulative charge of the preference shareholders as determined from year to year. Such a sum must of necessity be paid on any occasion out of the then allocated profits, and any equality, as it strikes me, can only be equality in the 7 per cent. dividend paid the preference shareholders for the period which the dividend covers.

The case of *In re Wakley*, [1920] 2 Ch. 205 (C.A.), as I read it, contain statements which suggest and justify the construction I adopt. They indicate that an annual cumulative and preferential dividend at a fixed rate is not, when a declaration is made so as to include amounts not declared in previous years, to be treated as including a sum designated as arrears, but as a dividend calculated at the annual rate, the amount being determined by the application of that rate to the shortage of previous years so as to answer the requirement of the cumulative provision.

The capital of the company in the *Wakley* case was divided

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into 2,000 preferred ordinary shares and 5,500 deferred ordinary shares.

Clause 5 of the memorandum of association, omitting non-essentials, was as follows:—

"The profits of other moneys of the company available for dividend which it shall from time to time be determined to distribute are . . . to be applicable first to the payment of a fixed cumulative dividend at the rate of 6 per cent. per annum on the capital paid up on the said preferred ordinary shares; secondly, to the payment of a fixed cumulative dividend at the rate of 12 per cent. per annum on the capital paid up on the said deferred ordinary shares; thirdly, of the surplus one-sixth shall be applicable to the payment of a further dividend on the said preferred ordinary shares ratably as aforesaid, and five-sixths shall be applicable to the payment of a further dividend on the said preferred ordinary shares ratably as aforesaid."

Younger, L.J. (now Lord Blanesburgh), dealt with clause 5 and the following article:—

"Article 119: The directors may, with the sanction of the company in general meeting, from time to time declare a dividend to be paid to the members in accordance with their rights and interests in the profits and other moneys available for that purpose."

He considers (pp. 225, 226) that:—

"A cumulative preferred dividend is . . . correctly described as one which gives to the holder of the preferred share *pari passu* with all other holders of shares of the same class a right to receive out of a fund of profits made available for dividend under the articles of the company and in priority to the holders of all junior shares in it a sum measured by the percentage rate and the period of time over which the dividend has not been paid in whole or in part. The dividend when paid—not being in any true sense in arrear up to that moment—is paid out of the fund then made available for its payment for the year or other financial period of the company in which it is paid. It is not paid in respect of any previous period of non-payment—when it was neither due nor payable—it is paid exactly in the same way as is a dividend at the same time paid out of any residue of the dividend fund to holders of ordinary shares in respect of which there has been no distribution for a period as long or it may be even longer."

(In this last paragraph he is speaking of the ordinary shares, which were also cumulative). He continues:—

"In other words, in respect of the time with reference to which dividends are paid, there is no difference between a cumu-

lative preference and an ordinary dividend. Each is a dividend for the year or other financial period of payment: that the preferred dividend is preferential, fixed, and cumulative means only this, that these are the factors by which the priority and the amount of the share of the dividend fund appertaining to the preference shareholder are ascertained."

In the same case Lord Sterndale, M.R., said, at pp. 216, 217:—

"The shareholders, in my opinion, acquire no right to any dividend until there are, in the language of clause 5 of the memorandum, 'profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute' . . . When these conditions are fulfilled the shareholders acquire the right to add to the dividend for the year the same amount for each year in which no dividend has been paid. If this be correct, the dividend which is paid is not in respect of each year but in respect of the year in which profits are declared for division, the amount being by virtue of the cumulative clause determined by the whole amount of dividends unpaid.'"

He speaks thus of the declaration of the dividends in question (pp. 217, 218):—

"They seem to me to be declarations of an interim dividend of 18 per cent. and 24 per cent., and a final dividend of 3 per cent. and 18 per cent. for the year, with an explanation that this amount is made up by taking into account the unpaid dividends of former years, and if so they are in accordance with what I think was the only declaration which the directors had power to make. As I have before pointed out, if they bear the meaning contended for by the respondents—that is, that the declaration was in respect of each year—I think they exceeded the powers of the directors, and if so they cannot alter the legal position of the shareholders."

Lord Warrington (then Lord Justice) at p. 222:—

"When profits are available and the company determines to distribute them it is the shareholder who is then entitled to the shares who takes the dividend, and not the person entitled to them in past years, though the dividend may in the case of cumulative dividend be large enough to cover the amount which would have been paid in past years if there had been profits available, but which was not paid because there were no such profits."

Having regard to the foregoing, I have arrived at the conclusion that these words "equal dividends" are ambiguous and present questions similar to that which troubled the Judicial Committee in *Dominion Coal Co. v. Dominion Iron and Steel Co.* (1909), 25 Times L.R. 309, [1909] A.C. 293, and the English Court of Appeal in *Patent Castings Syndicate Ltd. v. Etherington*,

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[1919] 2 Ch. 254, and our Supreme Court in *Canadian National Fire Insurance Co. v. Colonsay Hotel Co.*, [1923] S.C.R. 688. The word "equal" in respect to dividends must relate to some aspect of a dividend, namely, to its amount, rate, or seniority, and brings it, I think, within the class of cases which warrant the application of the doctrine of *contemporanea expositio*, because, to use the words of Lord Bacon, "there is some collateral matter out of the deed that breedeth the ambiguity." Lord Halsbury, in delivering judgment in the case of *Van Diemen's Land Co. v. Table Cape Marine Board*, [1906] A.C. 92, 98, said that "contemporaneous exposition is not confined to user under the deed," and that "all circumstances which can tend to shew the intention of the parties whether before or after the execution of the deed itself may be relevant." Lord Atkinson, who quoted in *Watcham v. East Africa Protectorate*, [1919] A.C. 533, at p. 540, the language above mentioned, laid it down that, in the case of a modern instrument, extrinsic evidence may be given not only to identify the subject-matter to which it refers, but, where in its language there is a latent ambiguity, evidence may be given of user under it to shew the sense in which the parties used the language they employed and what was their intention as revealed by their language interpreted in that sense.

In *Doe d. Pearson v. Ries* (1832), 8 Bing. 178, 181, Tindal, C.J., in reference to a modern document, said, "If the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties."

Park, J., in a later case, *Chapman v. Bluck* (1838), 4 Bing. N.C. 187, 195, said that "the intention of the parties must be collected from the language of the instrument, and may be elucidated by the conduct they have pursued."

The evidence offered in this regard consists of the issue on the one hand and the retention on the other hand of the share certificates dealing with the rights of the ordinary as well as those of the preferred shareholders under the original charter of the company. We are informed by counsel, I have no doubt correctly, that there are many original shareholders, both ordinary and preferred, who still hold these original certificates, and that those who have become shareholders by transfer have also acquired by that transfer the original certificates and still hold them. These certificates are found in exhibit 12 at the trial. The important wording is as follows:—

"The preference shares carry a fixed cumulative preference dividend payable out of the profits of the company applicable to dividends at the rate of 7 per cent. per annum on the capital paid-

up thereon. They rank both as to dividends and assets in priority to all ordinary shares. If, after providing for the payment in any year of the dividend on the preference shares and any balance due for cumulative dividends for preceding years, there remain any surplus net profits, any and all such as are not in the opinion of the directors required for the purposes of the company will be applicable to dividends on the ordinary shares for such year to the extent of but not exceeding 7 per cent. on the capital paid up thereon when and as from time to time the same may be declared by the directors. The remainder of any such surplus net profits shall then be applicable to the payment of further dividends equally per share upon both the preference shares and the ordinary shares, but no dividends shall be paid on the ordinary shares until after the company shall have created and have to the credit of a reserve fund a sum equal to at least one year's dividend on the then issued preference shares, the whole as provided in the letters patent incorporating the company."

These words appear in both the preference and the ordinary share certificates. When it is considered that these certificates were issued immediately after incorporation; that, while they were in the possession of the original holders, ordinary dividends were not paid during the years 1910, 1911, 1912, 1913, 1914, and 1915, and that in the year 1916 only 4 per cent. was paid, as against 10½ per cent. to the preferred shareholders, and in the years 1917 and 1918 only 6 per cent. was paid to the ordinary shareholders, as against 7 per cent. to the preferred shareholders, and that in four of the earlier years the 7 per cent. dividend was paid to the preferred shareholders, and nothing to the ordinary shareholders, it is not unreasonable to draw the conclusion that the terms in which both the company and all its shareholders understood the meaning of the words "equal dividends" involved equality of rate and nothing beyond.

In the supplementary letters patent issued on the 16th November, 1928, the following words occur:—

"All the rights, preferences and priorities attaching to the preference stock as set out in the letters patent incorporating the company shall remain undisturbed and shall attach to the new preference shares provided that the new preference shares shall have one vote in respect of each new preference share."

These words followed the clause which subdivided both the preference and ordinary shares.

Further, the supplementary letters patent, after confirming the resolution of the company for the conversion and subdivision of the shares, contain the words:—

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"And reserving and maintaining at all times for the shareholders of each class, preference and ordinary, all the rights attaching to shares of the par value of \$100 *as originally created*."

In the new certificates issued after the granting of these supplementary letters patent on the 16th November, 1928, there appears a clause referring to the supplementary letters patent as follows:—

"Reserving and maintaining at all times for the shares of each class, preference and ordinary, all the rights attaching to the shares of the par value of \$100, *as originally created*."

Whatever, therefore, the true meaning of the words "equal dividends" is, it is clear that those now claiming a construction more extensive than I feel able to adopt have, both in the supplementary letters patent and in the new certificates, established the standard by which their rights are to be adjudged, namely, the provisions under which the shares were originally created. After much consideration, I have come to the conclusion that in construing these rights the Court can look at the original certificates issued, the fact of their distribution and retention without objection by the shareholders, many of whom at present hold them, the transfer of shares to later shareholders under precisely the same terms, and the course of the company in its distribution of dividends, as indicating that the construction which I adopt is the one which, judging by the acts which parties did under them in respect of their rights as originally created, is the correct one.

I do not, however, place my judgment upon this latter ground. Apart from it altogether, my opinion is that the true construction of the words of the charter limits the ordinary shareholders to dividends equal, but only in the per annum rate of 7 per cent., to those payable to the preference shareholders.

It is with great respect and regret that I am constrained to differ from my brother Orde in his construction of the original letters patent, regarding, as I do, the declaration in his judgment in para. 2 thereof, as an adoption of the view that the ordinary shareholders should be paid an amount equal in all respects to what has been paid to the holders of the preference shares from the date of the incorporation of the defendant company and that they are not limited to the rate of 7 per cent. per annum.

I think the appeal succeeds, and that the judgment in appeal should be set aside and a declaration made restricting the rights of the ordinary shareholders in accordance with the views I have expressed.

MIDDLETON, J.A.:—I am of opinion that this appeal fails. I should, however, like to express my reasons in my own way.

Reduced to its simplest form, the contention of the appellants is that when the directors in any year pay the 7 per cent. upon the preferred stock of the company and think it inexpedient to declare a dividend upon the common stock and wise to retain in the coffers of the company undivided profits that have been earned, the right of the holders of the common stock to share in these proceeds so as to get a dividend equal to that paid on the preferred stock is gone, and that if in any succeeding year there is ample on hand to pay a dividend of 7 per cent. on the entire stock, preferred and common, and also enough to make good the inequality suffered by the holders of the common stock in the previous year, this surplus cannot be made use of for that purpose but must be then divided *pro ratâ* among all the shareholders.

It is enough to say, "It is not so written in the bond."

Primâ facie all shareholders share *pro ratâ*. Preference stock has, I think, the special rights and privileges given to it by the instrument of its creation—here the charter. The only preference is that it is entitled to a dividend of 7 per cent. per annum cumulative. In all else there is to be equality. The company and its directors are not given any power to give any greater privilege to either kind of stock. What the appellants argue is that by delaying the declaration of dividends upon common stock the directors may give a greater right to the holder of preference stock.

The second argument put forward is that by the form of the endorsement of the stock certificates greater rights are given to the holders of preferred stock than those offered by the charter. If it is sought to maintain this as an actual change in the rights of the holders of the preferred stock, then the argument fails, for nothing can override the provisions of the charter in this way. Save as provided by the charter itself, preferred stock can only be issued by virtue of a directors' by-law confirmed by a shareholders' by-law at a meeting duly called in which the shareholders' by-law is carried by a stipulated majority. The directors cannot create preferred stock by any such simple means as printing a statement upon the back of the stock certificate.

If this argument is put forward as an estoppel, several answers are obvious—first, an estoppel is personal and exists only in favour of the individual setting it up. It cannot be set up in a class-action. Sccondly, these plaintiffs acquired their preference stock before any stock certificate was issued. They did not purchase the stock upon the faith of the certificates upon which they now rely. Thirdly, that which is relied upon is the action of the directors or of some officer of the company. Whoever is responsible

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for the certificate was as much the agent of the plaintiffs as the agent of the defendants. This cannot create an estoppel. Fourthly, that which is relied upon is in no sense the action of the company. The directors have a strictly limited authority. They cannot alone issue preferred stock, so no representation by them can affect the rights of the holders of preference stock. These are governed by the by-laws and by the charter. Before there can be an estoppel by reason of the action of the directors, it must be shewn that that which is relied upon would be within their power.

GRANT, J.A.:—The plaintiffs, on behalf of themselves and all other holders of ordinary shares of the Steel Company of Canada, seek to restrain the defendant company and its board of directors “from paying any dividend upon its preference stock in excess of 7 per cent. per annum until such time as the defendant company shall have declared and paid dividends upon its ordinary stock equal per share in amount to the dividends previously paid on its preference stock,” with due regard for the changes which were made in the par value of the shares respectively as a result of the issue of supplementary letters patent providing therefor.

The learned trial Judge (Orde, J.A.) was of opinion that, upon the proper interpretation of the language of the letters patent, the plaintiffs were entitled to their injunction, and he so declared. By that interpretation it was held that no dividends could be declared or paid to the holders of preference shares, in addition to or in excess of the 7 per cent. cumulative dividend to which they were entitled, unless and until there should have been declared and paid to the holders of common or ordinary shares further dividends, amounting in the aggregate to 43½ per cent., upon the capital paid up thereon. In other words, that upon each common share there must be declared and paid a further dividend or dividends sufficient in amount to make the total sum of the dividends paid upon such common share equal in the aggregate to the total sum which has heretofore been paid upon each preference share, before any further dividend can be declared and paid upon such preference share.

The pertinent paragraphs of the charter or letters patent of the company are set forth in the reasons of the learned trial Judge. [They also appear in the reasons of MULLOCK, C.J.O., *supra*.]

As the company was incorporated under the Companies Act of Canada in the year 1910, subject to the provisions of that statute as it then stood, R.S.C. 1906, ch. 79, the rights in respect of dividends of the preferred and common shareholders fall to be determined by the construction which must be placed upon the para-

graphs above quoted from its letters patent. With the deepest respect for the opinion of those who think otherwise, a somewhat careful study of the matter has led me to the conclusion that the construction of these paragraphs is by no means simple.

As was stated by Lord Haldane, L.C., in *Will v. United Lankat Plantations Co.*, [1914] A.C. 11, at p. 15:—

“The point in dispute is one of construction, and construction must always depend on the terms of the particular instrument; it is only to a limited extent that other cases decided upon different documents afford any guidance. I make that observation because a good deal of authority has been cited in the course of the argument, and reference has been made to dicta of various learned judges. But in all those cases they were dealing with documents which were different from those we have to construe, and our primary guide must be the language of the documents we have before us.”

In that case the provision in the articles stating the rights of the holders of preference shares reads as follows:—

“That the new shares be called preference shares and that the holders thereof be entitled to a cumulative preferential dividend at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares; and that such preference shares rank, both as regards capital and dividend, in priority to the other shares.”

The shares in question were new shares, issued subsequently to the original stock issue, and upon special terms, and the House of Lords held that this provision set forth the entire statement of the rights of holders of such preference shares, and that they were not entitled to participate further in the profits of the company notwithstanding the general provision contained in another article to the effect that “the profits of the company available for distribution . . . shall be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively.”

In other words, as there was nothing in the articles to indicate that the holders of preference shares were to be entitled to any further dividends beyond those specifically directed to be paid to them, a mere general provision for the distribution of profits among the shareholders was not considered to have effected any alteration in that regard.

As was stated further by the Lord Chancellor at the bottom of p. 17:—

“Shares are not issued in the abstract and priorities then attached to them; the issue of shares and the attachment of priori-

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ties proceed *uno flatu*; and when you turn to the terms on which the shares are issued you expect to find all the rights as regards dividends specified in the terms of the issue. And when you do find these things prescribed it certainly appears to me unnatural to go beyond them, and to look to the *general provisions* of an article which is only to apply if nothing different is said."

The learned Lord Chancellor found one or two other features in the articles of the company then under consideration which, in his opinion, fortified the interpretation of which he approved.

As the paragraph quoted from the letters patent in the case at bar contains express provisions for the further participation, by way of dividends, in the net profits of the company by the holders of preference shares, although the conditions upon which the right so to participate are not, in my opinion, expressed in clear terms, the *Lankat* decision, and others based upon somewhat similar states of facts, have no direct bearing upon the decision of the present case, which must be determined upon the language of the charter. In other words, we must interpret as best we can this language, which expressly provides for further participation by holders of preference shares, and the decisions in cases in which there were no provisions for such further participation, and such right was sought to be established by inference, or in some similar manner, are not of any material assistance. So also with cases in which, for lack of any express provision as to further participation, the decision was reached with the assistance of the *primâ facie* rule that all shareholders in a company were entitled to be treated alike. No recourse can be had to any *primâ facie* rule, for the reason that there is here an express statement that the holders of preference shares are to participate further; what the Court has to find out is, what are the terms or conditions upon or under which the right to further participation shall arise?

The question in dispute between the parties to this action arose under the following circumstances. In the month of December, 1928, the board of directors of the defendant company passed resolutions declaring two dividends on both preferred and common shares (as such shares were constituted as a result of the issue of supplementary letters patent) by which the alleged right of the common shareholders to be paid the arrears of dividends on their shares (claimed to be 43½ per cent.), calculated from the time of the company's inception, was ignored. By such resolutions, a dividend at the rate of 7 per cent. was declared on the common, as well as on the preferred, and a further dividend, also, upon each of the two classes of shares. The latter is objected

to by the plaintiffs, who say, in effect: "You cannot declare or pay this or any dividend, beyond 7 per cent. per annum, on preference shares, unless and until you shall have first declared and paid 43½ per cent. on the paid up capital of the common shares so that the total percentage paid on the common, from the incorporation of the company down to the present time, shall be equal to the total percentage paid on the preferred shares."

As supporting this claim the holders of common shares rely upon the following words in the latter part of para. (a), *supra*, in the charter:—

"And the holders of such shares shall participate ratably with the holders of the issued ordinary shares in the distribution of net profits *after the holders of the ordinary shares shall have received dividends equal to those paid on the preferred shares.*"

It is of interest to read what is contended for by the plaintiffs in their pleading as the effect of the above provision in the letters patent. In para. 7 of the statement of claim they say (after stating that they had obtained and examined copies of the letters patent and supplementary letters patent):—

"The plaintiffs ascertained that the dividends on the ordinary stock of the defendant company were cumulative, and thereupon threatened to institute legal proceedings for the purpose of restraining the defendant company should the defendant company attempt to pass a resolution which would in any way alter or affect the rights of the holders of ordinary stock to claim that dividends on the ordinary stock were *cumulative*, and that arrears of dividends aggregating approximately 43½ per cent. must be paid on the ordinary stock of the defendant company before the holders of preference stock received dividends *pro ratâ* with the holders of ordinary stock in excess of 7 per cent per annum."

Again, in para. 8:—

"For the express purpose of preserving to the holders of ordinary stock whatever rights they then had in regard to the payment of *arrears of dividends*, the resolution proposed to be passed . . . was altered to read," etc.

Also in para. 10 they state:—

"The plaintiffs further allege that the stock certificates heretofore issued by the defendant company are ambiguous, and, erroneously and without any warrant of authority therefor, might be construed to imply that dividends on the ordinary stock of the defendant company are *non-cumulative*."

Paragraph 13 reads as follows:—

"The plaintiffs allege that the net earnings of the defendant company are sufficient to have enabled the defendant company to

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pay dividends equivalent to 7 per cent. per annum upon its ordinary stock since the date of the incorporation of the defendant company, after creating the reserve fund referred to in the fourth paragraph hereof."

In para. 15 they again refer to "the aforementioned arrears of dividends on the ordinary stock;" and by para. 1 of the prayer the plaintiffs ask:—

"(1) An injunction restraining the defendant company from paying any dividend upon its preference stock in excess of 7 per cent. per annum until such time as the defendant company shall have declared and paid dividends upon its ordinary stock equal per share in amount to the dividends previously paid on its preference stock."

It is manifest from the above that the plaintiffs, by their pleadings, were claiming to be entitled to cumulative dividends at the same rate (7 per cent. per annum) as those expressly provided by the charter to be paid to holders of preference shares, and that, dividends at such rate not having been paid to them in respect of all the years which had elapsed since the issue of the shares, the amount by which they fell short constituted "arrears" which had to be made up before there could be any further participation by holders of preference shares.

Mr. Robertson, of counsel for the plaintiffs, not only did not support this claim as set up by his clients in their pleading, but, on the contrary, stated to us that the plaintiffs were not claiming to be entitled to cumulative dividends or that the 43½ per cent. constituted arrears of dividends to which the plaintiffs were entitled in respect of any specified number of years or definite period of time. His contention was that the plaintiffs' rights were rather of what might be called a negative character; that is, the right, according to his contention, to object to the payment of further dividends to the preferred shareholders in excess of the 7 per cent. unless and until the 43½ per cent. be first paid to the holders of ordinary shares. He stated quite frankly that, notwithstanding the fact that there were ample net profits out of which payment of the 43½ per cent. could be made by the company to the ordinary shareholders, yet the latter had no right to call upon the company for payment of the whole or of any portion, conceding that the board of directors were not bound to pay any dividend to the ordinary shareholders. In this I think he was right, as I have not found any support of the contrary view either in the language of the charter itself or in general law applicable.

The plaintiffs' counsel, however, sought in another manner to reach the same result as would have followed if the claim set up

by the pleading, namely, that the dividend right of the ordinary shares was cumulative, were allowed. In substance, he stated the plaintiffs' position thus: that the holders of preference shares were limited in their rights in respect of dividends, the company being a going concern, to what is given to them expressly by the language of the charter; and that, subject thereto, the holders of ordinary shares were entitled to all the remaining net profits of the company as and when the same might be distributed in the way of dividends. In this view, after payment to the preferred shareholders of the 7 per cent. per annum, cumulative, subject to the provision in respect of a reserve fund in para. (b), the ordinary shareholders would be entitled to the remaining net profits on distribution, subject only to the further right of preferred shareholders to participate after the ordinary shareholders had received their 43½ per cent. to make their return from their shares equal the return theretofore obtained by the preferred shareholders. It will be noted that the result is exactly the same as if the charter provided that the holders of ordinary shares were to be entitled to a cumulative dividend of 7 per cent. per annum, and I cannot see that the mere fact that the claim is expressed by counsel in a manner differing from that in which it is set up in the pleading, can in any way alter its character. If effect be given to it, the holders of ordinary shares would be entitled to what is in fact a cumulative dividend, payable whenever a further distribution of the net profits comes to be made. Such a right attached to ordinary shares is very unusual, and, in my opinion, would require clear language for its support. That the holders of such ordinary shares would be compelled to wait for their accumulated dividends until the directors see fit to declare them, would not make them in any way peculiar, as preferred shareholders are in exactly the same position. The latter receive their "cumulative" dividends only as and when the directors think proper to declare and pay them.

Further, it is of importance to bear in mind that it does not vitally concern the company whether or not the plaintiffs' contention is valid, as the dividends do not constitute any liability unless and until they are declared. It is to the preference shareholders that the plaintiffs' contention is of vital importance, and, as between the two classes of shareholders, the allowance of the plaintiffs' claim would, to my mind, make the common shares clearly cumulative, as to dividends. The preference shareholders have exactly the same interest in the surplus after payment of the common share dividend as common shareholders, being entitled to participate ratably therein.

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In so far as they touch upon the matter, the provisions of the Companies Act of Canada, as it was in 1910, R.S.C. 1906, ch. 79, seem to be against rather than in favour of the plaintiffs' contention. Sections 47 and 49 are as follows:—

"47. The directors of the company may make by-laws for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividends and in any other respect, over ordinary stock as is by such by-laws declared.

"2. Such by-laws may provide that the holders of shares of such preference stock shall have the right to select a certain stated proportion of the board of directors, or may give them such other control over the affairs of the company as is considered expedient."

"49. Holders of shares of such preference stock shall be shareholders within the meaning of this Part, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Part: Provided that in respect of dividends, and in any other respect declared by by-law as authorized by this Part, they shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law."

By the interpretation section, 3 (d), it is provided that "shareholder" means every subscriber to or holder of stock in the company, and includes the personal representatives of the shareholder."

At the time of the incorporation of this company, the statute did not give the wide powers as to creation of different classes of stock that are now conferred by R.S.C. 1927, ch. 27, sec. 56. The only shares which (by the statute) could be given any special rights or privileges were preference shares.

Ferguson v. Buchanan, [1920] Sess. Cas 154, was cited as an instance in which common or ordinary shares were held entitled to a cumulative dividend. The facts however were radically different and in a most material particular.

The pertinent clause was worded as follows:—

"That out of the profits of the company, after making due provision for depreciation and reserve fund, the holders of 'A' preference shares shall be entitled to receive, as a first charge thereon, a cumulative preferential dividend at the rate of 8 per centum per annum, on the capital for the time being paid upon such shares; the holders of 'B' preference shares shall be entitled to receive, as a second and postponed charge, a preferential dividend at the rate of 5 per centum per annum on the said shares; and the holders of ordinary shares shall be entitled to receive, as a third

and postponed charge, a preferential dividend at the rate of two and a half per centum per annum on the said shares."

The Lord Justice-Clerk lays emphasis upon the provision that the dividends payable were to be charges upon the profits of the company, and were, each, explicitly stated to be "*preferential*."

On p. 158, after mentioning that the views of Sir Francis Palmer and Lord Wrenbury were in agreement, he quotes with approval, the statement from Stroud: "A preference dividend is, *primâ facie*, cumulative; so that failure of profits wherewith to pay it in any one year will be made good out of any profits that may be made in a subsequent year."

Again, after stating that this effect is strengthened, in the case under consideration, by the dividend being made a charge on the profits, he expresses the view (p. 159) that the use of the word "preferential" would alone involve that it was cumulative; and, lower down, he says that the ordinary meaning of the word "preference" imports that it should be cumulative.

This *primâ facie* meaning of the word "preference" or "preferential" was expressly assented to by the other members of the Court, and relied upon as establishing the rights of holders of "B" shares and ordinary shares to cumulative dividends.

That the use of the word "preference" or "preferential" will, *primâ facie*, make the dividend cumulative, has been similarly held in subsequent decisions.

In the case at bar, neither "preferential" (nor preference) nor "cumulative" is to be found in use with respect to ordinary or common shares, and the basis for the Ferguson decision is lacking.

Other decisions much relied upon in the plaintiffs' support were *Allen v. Londonderry and Enniskillen Railway Co.*, 25 W.R. 554; *Corry v. Londonderry and Enniskillen Railway Co.* (1860), 29 Beav. 263; and *Henry v. Great Northern Railway Co.*, 1 DeG. & J. 606. The decision in the *Allen* case rested upon the *Corry* judgment, and this again upon the *Henry* decision. In the *Henry* case the pertinent provision was that certain preference shares should bear "5 per cent. interest or preference dividend in perpetuity," and that certain other preference shares should be entitled to dividends at a given rate "in preference to the payment of dividends on the ordinary shares." It was held that the dividends on the preference shares were cumulative.

It was in this decision (at p. 643) that Knight Bruce, L.J., gave his illustration of a partnership which has been so frequently referred to in later cases.

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In the *Corry* case, the rights of holders of preference shares were under consideration. In the provisions with respect thereto, the words "interest" and "dividend" were both used. It is manifest, from a perusal of the decision, that the holders of these preference shares were deemed to be entitled to arrears, by reason of the special provisions governing their issue. In the *Allen* case, Jessel, M.R., said that a similar question as to ordinary stock was "exactly decided in the case before him" by Lord Romilly in the *Corry* case, as the holders of the ordinary shares were to receive a dividend "of the same amount." These decisions rest upon their special facts, and do not, in my opinion, afford any sufficient foundation for the plaintiffs' claim in the case at bar, which must be upheld or must fail by virtue of the language of the charter in question.

That the shareholders, whether preferred or ordinary, have no rights in respect of the profits of the company, save when these (or any portion of them) are set apart for distribution by the declaration of dividends, is elementary. The profits are the property of the company, which is a legal entity, altogether separate and distinct from the holders of its stock.

Gramophone and Typewriter Ltd. v. Stanley, [1908] 2 K.B. 89, contains very clear statements of the law, and has frequently been referred to in subsequent decisions. The Court held that the English company, which held all the shares in a certain German company, was not liable for income tax upon the profits of the German company, save only as to such part thereof as was actually distributed as dividends. It is made abundantly clear that the holder of shares has no inchoate or other right in the profits of the company, any more than in any other of its assets. His right is to his dividend, as and when declared in accordance with the provisions of the charter or by-laws governing the same.

Holders of shares cannot compel the company or the directors to declare or pay to them any part of the profits as dividends.

It is only as and when the directors "determine to distribute" profits, and only with respect to such portion of them as are so "determined to be distributed," that the rights of the shareholders become operative, and I think this may furnish the key to the solution of the problem in this case. In other words, in my opinion, it is only with respect to such portion of the net profits as the directors may from time to time determine to distribute that the latter part of the operative clause (lastly above quoted) is assuming to deal, and in respect of which the rights of holders of common shares are being stated.

Adverting to the particular charter provisions with which we

have here to deal, I note in the first place that these purport to outline the rights of holders of preference stock, of which it is stated at the outset that "the same when so issued shall have preference and priority as follows." Be it noted that they are to have both "*preference*" and "*priority*." In case of liquidation, etc., the holders are to have repayment, in *preference* to ordinary shareholders, of the amount of the par value of the shares and any arrears of dividends thereon. Then follow the provisions as to dividends. I note first that there is no provision for distribution of net profits generally; it is only such net profits of the company "which it shall from time to time be determined to distribute" that are being dealt with. There is no parallel with cases in which the "profits" of the company are to be distributed, such as in *Evling v. Israel & Oppenheimer Ltd.*, [1918] 1 Ch. 101, where it was provided that "the profits of the company in each year should be applicable," etc., and Eve, J., held that "profits" meant "the credit balance in the profit and loss account of each year," following the Scots decision in *Paterson v. Paterson & Sons* (1916), 53 Sc. L.R. 404, (1917) 54 Sc. L.R. 19.

The "net profits" then "which it shall from time to time be determined to distribute" are to be applicable "*first*," to the payment of a fixed cumulative preferential dividend at the rate of 7 per cent. per annum on the capital paid up on the said preference shares." Note that, although the word "preferential" *primâ facie* imports that the dividend shall be cumulative, yet, to make it quite certain that there may be no possibility of misconstruction, the clause contains the word "cumulative" as well. I note also that it uses the word "*first*," clearly implying that further provision is to follow for the application of what may remain of such net profits as it had been "determined to distribute," and as a part of the same sentence it provides that "the holders of such" (i.e. preference) "shares shall participate ratably with the holders of the issued ordinary shares in the distribution of net profits after the holders of the ordinary shares shall have received dividends equal to those paid on the preferred shares." The "net profits" here referred to are clearly the net profits "which it shall from time to time be determined to distribute," for several reasons, namely: because those are the only net profits which the paragraph purports to deal with at all, and this forms part of the sentence in which the net profits are so defined; and because previously it had been stated how these were "*first*" to be applicable, and this provision follows in regular sequence; and also because, on general principles, it is only in respect of net profits which it is "determined to distribute" that shareholders have any dividend rights.

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If the plaintiffs' claim that they are entitled to dividends at the rate of 7 per cent. per annum from the time of the company's incorporation is well-founded, it seems to me strange that the charter does not use apt words to provide therefor. It seems strange, also, that such an unusual provision should appear, incidentally only, in a paragraph setting out the rights of holders of preference shares, and not in a paragraph inserted for the express purpose which the plaintiffs put forward as the intention. It would have been a simple matter to have stated, after the provision for payment of a cumulative preferential dividend on the preference shares, that, "second, subject to the provisions of para. (b), the holders of issued ordinary shares shall next be entitled to a fixed cumulative dividend at the said rate of 7 per cent. per annum;" and then to have provided for ratable participation by both classes of holders in any further net profits "determined to be distributed." It must be recognised that this is the effect which the judgment of the learned trial Judge has, under the existing circumstances. As there are sufficient net profits to provide for payment of 7 per cent. on the ordinary shares, from the inception of the company, holders of such shares, by the judgment, would receive, under an entirely different set of words, exactly the same returns as would be received by preferred shareholders for whom that result is produced, by using apt words commonly used to bring about that result.

In other words, if the charter was intended to produce that result, why did it use the apt words, which could not be misconstrued, in the first part of the sentence, and then in the next part use such equivocal language to express exactly the same meaning? The draughtsman shews in the first part that he knows the appropriate and apt words that would clearly express his intention, and then proceeds, in the latter part, to use entirely different words. It seems to me that this use of such different language, and in the same paragraph, is reasonably to be taken as an indication that a different result was intended to be produced. As the right of preferred shareholders to a fixed cumulative preferential dividend at 7 per cent. per annum from the incorporation of the company was stated in clear and plain words, I do not see why the right to a similar dividend on the part of ordinary shareholders is not stated in similarly clear and plain words, if that was the intention. And when other and very different words are used, then I think it is but reasonable to conclude that some other intention was had in mind, if the language is reasonably and equally capable of other interpretation. It must also be recognised, if the judgment stands, that holders of common shares, under the present

circumstances as above mentioned, will receive exactly the same returns upon their shares as will holders of preference shares, notwithstanding the express provision that the latter were to have both "preference and priority." In other words, holders of preference shares would have "*priority*" only as to their dividend of 7 per cent., and not a "preference" also, being merely paid first. If that was the intention, and the preference was to be enjoyed (as well as the priority) only when there was not sufficient to pay, on both classes of stock, the 7 per cent. dividend, I do not know why the charter does not so state. If that were the intention, the lengthy and involved provisions which have given rise to this litigation would, in large part, have been unnecessary.

In this connection, I have been interested to read the form of declaration, which the learned trial Judge deemed essential to express, in clear language, what, in his opinion, was intended by the language of the charter. *Vide* declaration at close of judgment: "the holders of preference shares are not entitled to participate in any distribution of the net profits of the defendant company in excess of their fixed cumulative preferential dividend at the rate of 7 per cent. per annum until the total dividends declared upon the ordinary stock since the incorporation of the company shall be equal as to the rate thereof to that theretofore paid and declared upon the preference stock."

If I may so state, without disrespect, the declaration does not bear any very marked resemblance to the language of which it purports to express the intention, and I do not see any way in which the declaration could safely be shortened. The forms in which the plaintiffs endeavour to express what they put forward as the intention of the charter in this regard are equally lengthy, and equally unlike the language used in the document itself. It seems to me that the very fact that so many words have to be supplied in order to make it clear that the intention of the charter is what the plaintiffs contend, argues very strongly against their contention.

It seems to me, also, that the words used in that clause upon which the plaintiffs rely are capable of two or more interpretations: "after the holders of the ordinary shares shall have received dividends equal to those paid on the preferred shares." Does this mean the "holders" of ordinary shares collectively? If it does, then they have already received upwards of a million dollars more, as appears by the statement put in as exhibit 9. Or it may mean equal in rate, i.e. at 7 per cent.; and, in my opinion, this is what it was intended to mean. That is, that out of the net profits which it was "determined to distribute," after payment of

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the 7 per cent. to preferred shareholders, all common shareholders should also receive dividends of 7 per cent., which would thus be "equal to those paid" on the preferred shares.

With great respect for the contrary view of the learned trial Judge, I am not impressed with the fact that the draughtsman has used the plural in this clause, where he uses the words "*dividends* equal to those." The whole paragraph is not drawn with such strict and careful regard for exactness of expression as to call for rigid interpretation. In the very next paragraph (*b*) dealing with the same subject-matter, a plural is used where it is quite apparent that the singular is intended. "No dividends shall be paid on the ordinary shares until after the company shall have created . . . a reserve fund," etc. Manifestly, it means that no "*dividend*" is to be paid on ordinary shares until the specified reserve fund is first provided for; unless the draughtsman, because there were to be numerous holders of ordinary shares, referred to the distribution made to them, as "dividends" paid to "holders of ordinary shares." If that be so in the one case of using the plural, why not in the other?

It is urged for the plaintiffs that dividends are not necessarily payable with respect to any particular period of time, and that is undoubtedly the abstract legal position in that regard. But it is also true that dividends are usually declared with respect to such a definite period, as annually, or half-yearly, or quarterly, and in the present case, para. (*b*) lends support to the defendants' position, in that, in providing for a reserve fund, it states that it is to be "at least equal to *one year's dividend* on the then issued preference shares." This seems to me to indicate that the draughtsman, in referring to the dividends on preference shares, had in mind the "7 per cent. per annum" to which holders thereof were entitled in priority, and that holders of common shares were intended to receive in the order stated, out of the net profits which were "determined to be distributed," an equal dividend, that is, 7 per cent.

Counsel for the defendants also contended that the stock certificates which were issued to all shareholders, both preferred and common, shortly after the grant of the letters patent, should be looked at, as contemporaneous exposition of a clause which is couched in ambiguous language.

The same form of certificate was used down to the time of the grant of the supplementary charter. As I am not convinced in my own mind that we are entitled, under the circumstances of this case, to look at or consider the form of the stock certificate for such purpose, I prefer not to express any opinion in that regard.

For the reasons which I have given, I would allow the defendants' appeal and dismiss the action, both with costs.

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Appeal dismissed (HODGINS and GRANT, J.J.A., dissenting).

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Criminal Law—Obtaining Money by False Pretences—Intent to Defraud—Misrepresentations—Advertising Lottery—Evidence—Conviction—Appeal—Criminal Code, secs. 236(a), 404, 405.

The defendant was convicted under secs. 404 and 405 of the Criminal Code of the offence of obtaining money from various persons, by false pretences, with intent to defraud; and also under sec. 236(a) of advertising a scheme for disposing of certain property by a mode of chance:—

Held, upon appeal, that both convictions were supported by the evidence, and should be affirmed.

The advertisements published in newspapers, and followed by circular letters addressed to persons who answered the advertisements, related to an alleged puzzle for the correct solution of which prizes were offered, but it was in fact no puzzle, and the advertisements and letters contained misrepresentations which deluded those who supposed themselves to be competing for prizes into sending money to the defendant. As the result of the scheme, a large sum of money was received by the defendant. There was no evidence to support the contention of the defendant that the contestants were in any legal sense his agents. There never was any serious or honest intention to select the winners from the numerous body of contestants by any other than an arbitrary selection; and, having regard to these facts and others appearing in the evidence, fraudulent misrepresentations transgressing the provisions of the Criminal Code were established, and the scheme advertised constituted a lottery within the meaning of sec. 236(a).

It is not necessary that the false pretence should be made in express words, if the idea is conveyed: *Regina v. Giles* (1865) 34 L.J.M.C. 50, 53; *Regina v. Cooper* (1877), 2 Q.B.D. 510, 513.

THE following statement is taken from the judgment of GRANT, J.A.:—

This is an appeal from a conviction by O'CONNELL, Junior Judge of the County Court of the County of York (sitting without a jury in the County Court Judge's Criminal Court), dated the 25th November, 1929. A number of charges were laid against the accused in respect of the same matter, as to 6 of which he was found guilty, being acquitted upon the others. The charges, as set out in the notice of appeal, in respect of which he was found guilty, are as follows:—

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“(a) In the years 1928 and 1929, at the city of Toronto, and elsewhere in the Province of Ontario, did print, advertise or publish, or cause or procure to be made, printed, or advertised or published, a certain proposal, scheme, or plan for disposing of certain property by a mode of chance, contrary to the Criminal Code, section 236 (a).

“(b) And further that the said prisoner, at the time and place aforesaid, did unlawfully obtain or procure to be delivered to Strand Candy Company Limited from certain persons who had become agents for or customers or clients of the said Strand Candy Company Limited the sum of \$18,964, by false pretences, with intent to defraud, contrary to the Criminal Code, section 405.

“(c) And further that the said prisoner, at the time and place aforesaid, did unlawfully obtain or procure to be delivered to Strand Candy Company Limited, from one Norma Keith, the sum of \$8.91, by false pretences, with intent to defraud, contrary to the Criminal Code, section 405.

“(d) And further that the said prisoner, at the time and place aforesaid, did unlawfully obtain or procure to be delivered to Strand Candy Company Limited, from one Nellie Godden, the sum of \$8.96, by false pretences, with intent to defraud, contrary to the Criminal Code, section 405.

“(e) And further that the said prisoner, at the time and place aforesaid, did unlawfully obtain or procure to be delivered to Strand Candy Company Limited, from one Jane Rudder, the sum of \$7.16, by false pretences, with intent to defraud, contrary to the Criminal Code, section 405.

“(f) And further that the said prisoner, at the time and place aforesaid, did unlawfully obtain or procure to be delivered to Strand Candy Company Limited, from one Robert Monie, the sum of \$6.16, by false pretences, with intent to defraud, contrary to the Criminal Code, section 405.”

The charge set forth in (a) comes under what is commonly called the lottery section of the Criminal Code (236 (a)). The other charges are laid under the section of the Code dealing with false pretences.

The lottery section reads as follows:—

“236. Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding \$2,000 who

“(a) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever.”

Sections 404 and 405 contain the definition of false pretences and a statement of the offence and its punishment, respectively:—

“404. A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

“405. Every one is guilty of an indictable offence and liable to three years’ imprisonment who, with intent to defraud, by any false pretence, either directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen or procures anything capable of being stolen, to be delivered to any other person than himself.”

The charge laid in para. (b) of the notice of appeal as above quoted is a general charge under the false pretences section, covering the whole scheme whereby the accused obtained nearly \$19,000 from approximately 2,000 persons scattered over the Dominion of Canada. The other charges, (c), (d), (e), and (f), *supra*, have reference to individual cases of persons who sent in money under the inducements offered by the advertisements and letters of the accused under the scheme above mentioned, of which particulars appear below.

In the latter part of 1928 and early portion of 1929 the accused caused certain advertisements to be inserted in newspapers published in Toronto. These took the form of a puzzle contest which came to be known as the “Snookums Twin Contest;” in respect of which cash prizes were advertised as intended to be given to the successful contestants. Exhibits 2 and 3 contain samples of these advertisements as filled in and forwarded to Strand Candy Company, the name under which the accused was carrying on this contest, and such advertisements formed the commencement of the scheme. The contestant was required to pick out, from five other babies shewn, the one which was exactly like Snookums, and was required to forward a copy of the advertisements clipped from the newspaper and filled in with the names of the twins and the signature and address of the contestant. In each advertisement it was stated that there were 94 cash prizes. In exhibit 2 appear in the centre, in large and prominent type, the words

“Cash
\$1,500.00
Prizes.”

In exhibit 3 this appears

“Cash
\$1,000.00
Prizes.”

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So also further on in exhibit 2 this statement is repeated:—

\$1,500.00 Cash in Prizes

| | | |
|---------------------------------|------------|------|
| 1st Prize | \$1,000.00 | Cash |
| 2nd " | 150.00 | " |
| 3rd " | 75.00 | " |
| 4th " | 25.00 | " |
| 5 Prizes \$10.00 each | 50.00 | " |
| 10 " \$5 each | 50.00 | " |
| 75 " \$2 each | 150.00 | " |

In exhibit 3 the first prize is given as \$500 cash instead of \$1,000 as in exhibit 2, and the other prizes are as stated in exhibit 2. The words "Costs Nothing to Try" appear twice in large and prominent type.

Under the heading "How to Win" appear the following: "Two of the babies pictured above are exactly alike. Can you find them? Note carefully hair, bracelets, eyes, etc."

As the solution of the so-called puzzle presented not the slightest difficulty, nearly all of the persons who responded to the advertisement made the correct choice. Certain so-called rules are set forth which need not be set out in detail. Employees of the Candy Company and their relatives were barred from the contest. No. 4 reads: "Be neat; remember in case of a tie neatness will be considered in awarding prizes."

In exhibit 2, No. 6 reads: "Judges' decision to be final." On each of the advertisements appeared the following:—

"Given.

"Every contestant who qualifies will be given one .
 dollar in cash in addition to any prize they may win."

On exhibit 3 appears the following:—

"Costs you nothing to win

First Prize

"It need not cost you one cent to win any of the big
 cash prizes."

On each of the advertisements appears the following in substantially the same language:—

"When we receive your entry we will advise you of the number of points you have gained and we will send you absolutely free our small automatic salesman, which will provide much amusement for you and your friends, while disposing of a few boxes of our famous Strand chocolates at a few cents a box.

"This will qualify your entry for the prizes, but you do not obligate yourself to do anything for us by sending in an answer to this puzzle."

It appears in evidence that approximately 2,000 persons responded to the advertisements.

When the answers to the advertisements were received, clerks in the office of the accused sent to each successful contestant a circular letter (exhibit 6) which purported to be signed by the accused and of which the following is a copy:

"Strand Candy Company.

"Although I have not time to write to everybody who sent in an answer to our puzzle, I feel that I should write to you to congratulate you on sending in an absolutely correct answer.

"The primary judges have shewn me your entry and have advised me that they have awarded you the full number of points (600) six hundred.

"1,000 points will win \$500, \$700, or \$1,000, according to the number of books of candy you sell. (See back of book).

"When you sell a book and send us the money we will add 375 points to your total, giving you the splendid total of 975 points. You will be within 25 points of winning first prize and there are 94 prizes. A very nice position to be in indeed!

"What you have to do now is comparatively simple. Just ask your friends to pull a tag for a box of chocolates and pay you the amount on the back of the tag. When all the tags are sold, select the premium you want and fill in the order on the back page of the booklet. Send us the order with \$7.16 and we will ship you by express the chocolates and your premium. (If you wish to keep \$1 cash, instead of a premium, send us only \$6.16.)

"(We pay all shipping charges).

"Since you have done so remarkably well so far, I am sending you the book of tags with this letter, as you will certainly want to win \$500 cash, and I know that you will not quit now when you have such a wonderful opportunity to make more in one week than most people save in two years.

"I would suggest that you start out with your book right now so that you will be sure to have the money sent to us within 10 days. This will add \$50 to first prize.

"Again congratulating you on your success, I am,

"Yours truly,

"B. G. Marshall,

"Strand Candy Co.

"P.S. The extra 25 points are awarded for neatness and general appearance by the final judging committee after the close of the contest."

With the circular letter (exhibit 6) there was sent to each correspondent what was called the automatic salesman in the form

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of a small booklet with instructions as to the manner in which it was to be used (exhibit 6a). The following appears at the top of page 2 of this booklet:—

“Were you awarded 475 points or more for your answer to ‘Snookums Twin Puzzle?’ If you were, you are very fortunate, for you are entitled to your choice of the premiums illustrated in this booklet, and your opportunity to win one of the large cash prizes is good indeed.”

In view of the fact that practically all of the contestants answered correctly the so-called puzzle, each of them received this booklet, and to each of them the statement is thereby made, “your opportunity to win one of the large cash prizes is good indeed.”

Lower down on the same page appears this statement, “1,000 points or nearest thereto wins first prize—\$1,000.”

At the bottom of this page appears the following paragraph:—

“As soon as you have disposed of all the tags on page 6 and collected the money, fill in the order form on page 7 and send it to us with the money you have collected (\$7.16 if you select a premium and \$6.16 if you keep a cash commission). We will ship you by express the 16 boxes of Strand candies and your premium (unless, of course, you keep a cash commission); 375 points will also be added to the total you have already gained. 1,000 points or nearest thereto wins first prize (\$1,000 cash), 25 points are left for the final judging committee to award after all the entries are in.”

The circular letter (exhibit 6) was subsequently followed up by exhibit 7, another circular letter also purporting to be signed by the accused. It reads as follows:—

“Is there anything I can do to help you sell your books of Strand chocolates?

“I am holding your entry in my desk because you have gained the highest pointage possible for your solution of the puzzle—600 points. (The next highest possible is 575 points).

“When you have had your friends pull all the tags and sent us the \$7.16 (\$6.16 if you wish to keep a cash commission of \$1), I will add 375 points to your splendid total, making 975 points you will have gained and 25 points yet to be awarded by the final judging committee.

“You will be right on top—nobody can beat you at this stage of the contest, and remember if anybody has tied with you at the end of the contest the Strand Candy Company will award the full amount of the prize to each.

“Surely you will now appreciate your opportunity to win the large cash prize and try to sell at least one book of tags. (If I

were in your position, I think I would go after the \$1,000 by selling three books).

"I am enclosing another book herewith and an envelope which I have addressed personally to myself so that I will be sure to get your order when it comes into the office.

"I will be unable to write to you again before this contest closes, but you will no doubt appreciate how good your standing is when I have taken the trouble to write to you this second time and you will appreciate what I have done for you when the prizes are awarded. Don't forget there are 94 cash prizes.

"Yours truly,

"B. G. Marshall,

"Strand Candy Co.

"P.S. \$50 will be added to the first prize provided your first book is sold and the order in the mail within 10 days from the day you receive it."

When the contestant sent in the order for the candies together with the money (either \$7.16 or \$6.16 if he was retaining \$1 as his commission), exhibit 8 was sent to him, and this also purported to be signed by the accused. It will be noted that each of these circular letters purported to be a personal letter written by the accused to the individual contestant. Exhibit 8 reads as follows:—

"I was very glad when your order reached the office this morning. I have credited your splendid entry with another 375 points which gives you the remarkable total of 975 points, with points yet to be awarded for neatness and general appearance of the entries, 1,000 points or nearest thereto wins first prize. You are now well in the running.

"I am enclosing another booklet, and if you will look on the back page you will see that first prize if one book is sold is \$500 cash, whereas if you sell 2 books, first prize is \$700 cash, and if you sell 3 books, first prize is \$1,000 cash. Even if you win 2nd, 3rd, or 4th prize, I should imagine that you would consider it well worth an extra effort to sell one or two more books in view of the much larger amount of money you stand to win, not to mention the valuable premium you get in addition to any other prize for selling each book.

"The chocolates will be shipped from the factory by express in the course of a few days, and I feel sure that your customers will be more than delighted with the quality.

"Again thanking you for your valuable assistance in helping

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us to introduce these chocolates in Canada and wishing you every success in winning one of the big cash prizes, I am,

"Yours very truly,

"B. G. Marshall,

"Strand Candy Co.

(In ink.)

"Would advise you to try to sell two more books, your chance of winning one of the big prizes is *good*."

Under date of the 16th March, a further circular letter was sent to each contestant (exhibit 13), which also purports to be a personal communication from the accused and to be signed by him as president of the company. It reads as follows:—

"March 16/29.

"On looking up your entry in our 'Snookums Twin Contest' your opportunity appears very good to me.

"I am therefore taking it upon myself to send you this certificate for \$1,000 which you may cash at our office as soon as you receive *official* notification that you have been successful in winning *first prize*.

"As soon as your friends have pulled all the tags in your book and you send us the order, I notice that you will have 975 points—this is the highest pointage possible to date, and there is only a short time to go.

"Please *rush* your order so that I can hand your entry to the final judging committee.

"If your order is too late I will return your money.

"Yours truly,

"B. G. Marshall, President.

"Please use the envelope I enclose you."

Enclosed with exhibit 13 there was sent to each of the contestants exhibit 14, a certificate in the following words, which is made out to appear in somewhat the same form as a bank cheque and purports to be signed by the accused as president of the company.
"\$1,000. \$1,000."

"On Presentation of This Certificate

"At the offices of the Strand Candy Company Limited, at the Strand Building, in Toronto, Canada, together with official notification that the holder is the winner of first prize in our 'Snookums Twin' contest, the holder of this certificate will receive one thousand dollars cash.

"This certificate may be
presented in person or
by registered mail.

B. G. Marshall,
President.

"\$1,000.

\$1,000."

January 22 and 23. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A. App. Div.

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I. F. Hellmuth, K.C., and *J. R. Roaf*, K.C., for the appellant, contended that a lottery is a scheme for distributing prizes by chance. The adventurers contribute to a fund which they agree among themselves shall be unequally divided upon the happening of an event: *Willis v. Young and Stenbridge*, [1907] 1 K.B. 448. In the present transaction the adventurers did not contribute to a fund. In order to win a prize they were merely under an obligation to sell certain quantities of candies to their friends. Services rendered by the contestants do not constitute valuable consideration. Section 236 (a) of the Code does not state that consideration must be given by the contestants; but reference must be had to the whole of the section, and it requires that consideration be given. To bring a transaction within sec. 236 (a) of the Code, the prizes must be distributed by a mode of chance: *Rex v. Robinson* (1917), 29 Can. Crim. Cas. 153. The only element of chance in the present case is whether or not the agents (contestants) will get their commission on the candies which they have sold to their friends. The Strand Candy Company Limited appointed the contestants its agents to sell the candies. It was not the intention of the accused that the contestants themselves should purchase the candies. The contestants were not being defrauded, as they had no property in the money which they sent to the company: *Rex v. King*, [1897] 1 Q.B. 214. The contestants were not deprived of possession of their own property; therefore sec. 405 of the Code is not applicable: *Rex v. Robinson*, [1915] 2 K.B. 342; *Regina v. Cooper* (1877), 2 Q.B.D. 510, 513.

A. W. Rogers, for the Crown. The phraseology used in letters sent by the Strand Candy Company Limited to the adventurers clearly shews that the company considered the purchasers of the candies the customers of the adventurers, and not the customers of the company. This shews that it was not the company's intention to make the contestants its agents. If the contestants were agents of the company, they were employees of the company. Rule 1 of the contest provided that employees were barred from the contest. These contestants were not treated as employees of the company, and so they were not agents of the company. No consideration is required to be given in Canada in order to constitute a lottery. No mention is made in sec. 236 (a) of consideration, and so it is not required. In England the courts usually require that consideration be given by the contestants, but in *Smith's Advertising Agency v. Leeds Laboratory Co.* (1910), 26 Times L.R. 335, the English court held that there was a lottery, although no considera-

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tion had been given by the adventurers. It was impossible for the judges to make the award on merit. It could only be made by chance, and so the transaction was a lottery: *Willis v. Young and Stembridge*, [1907] 1 K.B. 448. If there is an arbitrary allocation, the scheme is a lottery. The chance lies in the fact that the contest judges could only decide arbitrarily who the winners were.

March 17. The judgment of the Court was read by GRANT, J.A. (after setting out the facts as above):—I deal with the false pretences charges first.

As the so-called puzzles set out in the advertisements exhibits 2 and 3 are in fact not puzzles at all, but are readily and easily answered, it was to be, and was indeed expected by the accused, that the great majority of the persons responding to the advertisements would furnish correct answers, as was borne out in the event. That these advertisements were of a fraudulent character appears upon their perusal, but whether or not they transgress the provisions of the Criminal Code may be another question. For the present it is sufficient to note that they predicate an award to be made by judges, neatness to be considered in the awarding of the prizes.

When we come to consider exhibit 6 in the light of the facts as they existed at the time that it was sent, it must at once be realised that, taken as a whole, it is false. The contestant, reading the first paragraph, would at once be led to the conclusion that he had been singled out personally by the accused and was being congratulated upon his sending in the correct answer. The statement that the writer had not time to write to everybody who sent in an answer to the puzzle, but that he felt that he should write to this contestant to congratulate him, is one of those half-truths which are the worst kind of falsehoods. As the evidence shewed, the accused did not deal with these himself at all. The answers sent in by the contestants were dealt with by clerks in the office, who glanced at them, and then, more or less automatically, forwarded the circular letter exhibit 6. Although the accused stated that he did see a great many of the answers afterwards and that they were left in the office for him to look over, as a matter of fact I think it is extremely doubtful if he bothered with them at all.

The statement contained in the next paragraph of this exhibit is another half-truth similar to the above. There were no "primary judges," as that expression would be understood by a contestant receiving the circular. As already stated, the clerks in the accused's office merely glanced at the answers received and then mailed the circular letter. The accused was not advised by

the clerks (nor, needless to state, by any primary judge) that 600 points had been awarded, and, in so far as the evidence shews, he was not advised of anything except of the number of answers received and that in only a general way. These were dealt with by the clerks themselves and not by the accused. It will be noted that this exhibit also gives the contestant to understand that "neatness and general appearance" constitute the determining feature with the "final judging committee."

The last line in the circular, "again congratulating you on your success," is a fair sample of the numerous instances in which were uttered half-truths that were, in the impression intended to be produced and which was actually produced upon the minds of the contestants, utterly false. Each contestant receiving this circular was led to believe that he was in a most favourable position as compared with the others, and that, as compared with them, he had outstanding chances of success. As the same circular was sent to about 2,000 of the contestants, the deceit which was thereby practised is at once apparent.

Referring to the further circular letter (exhibit 7), in the second paragraph the accused states: "I am holding your entry in my desk because you have gained the pointage possible . . . 600 points. (The next highest possible is 575 points)." This paragraph contains two misstatements, as the accused was not holding the entry in his desk, nor was it true that "the next highest possible is 575 points," for the simple reason that there was no next highest possible, all of the contestants who received the circular being in exactly the same position, that is having 600 points. The impression evidently intended to be conveyed was that the individual contestant was in a pre-eminent position and that there were others whose position was less favourable than his, an impression which was, upon the evidence, utterly false. They were all in exactly the same position in that regard.

The next paragraph contains a further reference to the final judging committee. No such committee was in existence, nor was there any such judging committee right up to the time when the whole scheme was brought to a close by the entry of the police.

The next paragraph is equally false: "You will be right on top—nobody can beat you at this stage of the contest." The writer knew perfectly that each of the 2,000 was receiving this same circular, and that to each of them were being made these same statements, and that any one or more of the 2,000 could "beat" the person to whom the circular was being sent. No one (or more of them) was on top, because there was neither top nor bottom, all being on exactly the same level. The deceit which was being

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practised on each and every one of them is as evident upon this circular, in the light of the facts, as was the intention of the accused, namely, to lead the recipient of the circular to believe that his was an exceedingly favourable position and his chances of success were notable.

The effort on the part of the accused to give emphasis to the outstanding prospects of success of the person to whom the circular was sent is evident from the personal character of the letter, sought to be expressed in the last two paragraphs of the document. The accused seeks to give the impression that the very favourable position of the contestant addressed has led to the personal intervention of the accused himself.

In the first paragraph of exhibit 8, another circular letter which was sent to all of these contestants, reference is made to "your splendid entry" and also to "the remarkable total of 975 points." The entry was not splendid because there were about 2,000 similar entries, and the total of 975 points was not in any sense remarkable, unless the writer was guilty of irony, as all the others had the same number of points.

In the latter part of the next paragraph, when urging the contestant to sell one or two more books, the expression is used "in view of the much larger amount of money you *stand to win*." This, of course, was not true, as the whole 2,000 could not possibly "stand to win," for there were only 94 prizes in all, even if there were any honest intention to give a prize to anybody.

Then the statement purporting to be written in at the bottom, "would advise you to try to sell two more books, your chance of winning one of the big prizes is *good*," contains another palpable falsehood. Assuming that the first four might reasonably be called "big prizes," then each of the contestants to whom this circular was sent would have, at the best, one chance in about 500 of winning one of the big prizes. Can it be argued that such a chance is "good?"

The last circular (exhibit 13) and the imitation cheque, called a certificate (exhibit 14), were evidently intended to persuade any who did not succumb to the specious promises contained in the earlier communications. The whole tenor of this circular and the certificate enclosed therewith is directed to impress upon each contestant that his chances of winning are outstanding. The utter falsity of the impression intended to be conveyed will be at once apparent if one places alongside of this circular and certificate a plain, frank statement of the actual facts. To illustrate, let us suppose that the accused had commenced his letter to each of the 2,000 persons with the statement, "We have received correct

answers to our puzzle from approximately 2,000 persons, each of whom has the same chance as yours of winning one of our prizes."

As a result of the above scheme there were received in all nearly \$19,000, as shewn in exhibit 26. The candies were not manufactured by the Strand Candy Company, which was not actually engaged in the candy business at all, but were purchased by the accused from manufacturers at a cost of a little over \$500.

For the accused it was urged that what he had done did not constitute a breach of the provisions of sec. 405, upon the grounds that the contestants were really agents of the Candy Company, that is, of the accused, and that the money sent in was obtained by them as agents from their friends and belonged to the Candy Company. It was further urged that the statements or representations contained in the advertisements and various circulars, etc., were not as to facts present or past, but as to the future, and therefore did not come within the definition of false pretences. I do not think this latter contention can be urged, in view of many of the false statements referred to above, which purported to deal with facts then existing and not merely with the future. It is also pertinent to note that, as stated by Blackburn, J., in *Regina v. Giles* (1865), 34 L.J.M.C. 50, 53, "It is not requisite that the false pretence should be made in express words, if the idea is conveyed;" and also, as stated by Bowen, L.J., in *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459, at p. 483, that "there must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion."

The above statement of Blackburn, J., was quoted with approval by Lord Coleridge, C.J., in *Regina v. Cooper*, 2 Q.B.D. 510, at p. 513.

I am also of opinion that there is no evidence on the record to support the contention that the contestants were in any legal sense agents of the accused or his company. In my opinion, there was an apparent attempt on the part of the accused so to word his circulars as to make agents of his correspondents, but there is ample evidence that no such legal relationship existed between them. In some cases, of which counts Nos. 5, 6, 7, and 8 are examples, the individual contestant sent his own money in whole or in part, and no distinction was made between such cases and all the others. All the accused cared about was that the money should be sent in: he was quite indifferent as to the source from which it came. Apart from this, however, the circulars contained numerous references to "your" customers, "your" entry, "your" money, etc. Further, the contestants were not, as between themselves and the accused or his company, under any obligation to

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forward the money or any part of it. They were under an obligation to their friends from whom they received the money, if they adopted that course, rather than put up the money themselves, either to send the money on to purchase the candies or to return the money to their friends. But this was not an obligation existing between the contestant and the accused, who had no means of knowing whether the contestant was going to order candies or not. It is quite apparent to me upon the evidence that the accused was looking to the contestant to furnish the money, and, as already stated, he was quite indifferent as to the source from which the money was obtained, and made no inquiry in that regard.

Upon all the facts I have not the slightest hesitation in expressing the opinion that the conviction upon the counts charging false pretences should be affirmed and the appeal in respect thereof dismissed.

I am also of the opinion that the conviction under count number 1 should be affirmed. As has been already stated, in my opinion this was a scheme put forward for the purpose of getting money from the individual contestants who might reply to the advertisements or to the circulars by which the advertisements were followed. That these circulars were, in my view, bristling with false representations of fact, as well as with promises or undertakings which were never intended to be carried out, I have already affirmed. Among the fraudulent misstatements were those by which the contestants were led to understand that the entries were being adjudged upon their merits by judges or a judging committee. No such judging committee was in existence, nor was there any examination or inquiry or other proceeding of any similar character had with a view to deciding which of the contestants was entitled to succeed. The fact that the very same circulars, extolling the chances of winning on the part of every one of the contestants, were sent to all of them, furnishes positive proof, in my opinion, that no decision could be arrived at whereby any one or others of them could be declared the winner or winners, except by a mere arbitrary choice. It is manifest that there was no examination and decision upon the merits, and there could not be. The language of Vaughan Williams, L.J., in *Blyth v. Hulton and Co. Ltd.* (1908), 24 Times L.R. 719, at p. 721, seems to me to be very appropriate with respect to the facts of the present case:—

“The editor would really have an arbitrary unfettered choice as to who should be declared the winner of the competition, and that the winner would be selected not according to merit, but according to fancy or to some temporary rule which the editor might choose to adopt . . . But the present case was one in

which it seemed to him that the announcement that the decision would be by merit was merely colourable, and it was obvious that, in these circumstances, it could not be carried out, and on the face of the scheme the decision must be governed by chance."

The decision being by chance, that is, being made merely in an arbitrary manner and not upon merit, was held to constitute the scheme in question a lottery.

The same principle is enunciated in *Smith's Advertising Agency v. Leeds Laboratory Co.*, 26 Times L.R. 335, where the same judge, Vaughan Williams, L.J., at p. 337, is reported to have used, in substance, the following language: "Taking the advertisements as a whole, he was clearly of opinion that in truth and in fact it was not literary merit which was really to settle the final allotment of these prizes, but the arbitrary will of either the competitions editor or the committee."

In the case at bar, it appears to me quite manifest that there never was any serious or honest intention to select the winner or winners from the numerous body of contestants, by any other than an arbitrary selection, nor was there any real basis for making the selection in any other manner. I am therefore of opinion that such decision would be based upon pure chance, and that the whole scheme constituted a lottery within the meaning of the section. However that may be, the conviction upon the false pretences charges being sustained, and as in my opinion the sentence passed upon the accused was such as not to justify any interference therewith, even though the conviction in respect of the lottery count were set aside, my conclusion on the latter count is not of vital importance to the accused.

I would dismiss the appeal and affirm the conviction.

Appeal dismissed.

[APPELLATE DIVISION.]

BEATTY BROS. LTD. v. MURPHY.

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Husband and Wife—Sale of Article to Wife—Contract—To Whom Credit Given.

March 17,

Where an article was sold by the plaintiffs to a married woman, and not to her husband, and credit was given to her alone, it was *held*, that the husband was not liable for the price.

The statement of the law in Lush on Husband and Wife, 3rd ed. (1910), p. 368, adopted.

AN appeal by the defendant James Murphy from the judgment of the Seventh Division Court of the County of Essex in

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favour of the plaintiff company against the appellant for the recovery of \$159, the balance of the purchase-price of a washing machine, and dismissing the action as against the defendant Helen Murphy, the wife of the appellant. The defendants set up the defence that the machine did not operate properly, and the appellant maintained that he was not a party to the contract of sale and was not liable for the price.

February 4. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

I. Levinter, for the appellant. The learned trial Judge erred in finding that the washing machine in question was a necessary, considering the station in life of the defendants. The wife in her evidence says distinctly that it is not a necessary. The onus is on the plaintiff company to prove it to be a necessary. No evidence has been produced as to this. The wife had no authority, implied or otherwise, to bind her husband to such a large expenditure in the humble circumstances and station of life in which they were living: *Gebbie v. Kershaw*, [1927] 3 D.L.R. 156. The wife's presumed or implied authority to buy goods for the house is limited to necessities. In this case actual authority to bind the husband must be shewn before there can be ratification: *Debenham v. Mellon* (1880), 6 App. Cas. 24; 5 C.E.D. (Ont.) 672; *Phillipson v. Hayter* (1870), L.R. 6 C.P. 38.

J. E. Hair, for the plaintiff company, respondent. The form of the contract shews clearly that it was the intention of the respondent company to bind the husband. In any event the learned trial Judge was right in finding that the machine was a necessary and that the husband was therefore liable: *Vopni v. Bell* (1908), 17 Man. 417. It is immaterial that the price of the machine was charged to the wife alone in the books of the company.

March 17. The judgment of the Court was read by MIDDLETON, J.A.:—An action in the Seventh Division Court of the County of Essex against husband and wife for the price of an electric washing machine. At the trial judgment was given against the husband; the action was dismissed as against the wife. The husband now appeals.

In my view the appeal must succeed: the washing machine was sold to the wife, and not to the husband, and credit was given to her alone.

The contract is in writing. A printed form is filled in. This form is ambiguous. The contracting party is described as "I or we" throughout. At the foot of the contract, in a blank space,

the husband's name is inserted, but the contract was not signed by him. His name was not signed by his wife—apparently it was inserted as the husband's name by the agent. The contract was then signed by the wife. In an endorsement on the contract is a place for the history of the transaction, in which a blank space is left for the name of the person to whom credit was given, and in that space is inserted the name of the wife; also, accounts were rendered to her.

The law is very clearly stated in the 3rd ed. (1910) of Lush, Husband and Wife, p. 368:—

“Where a married woman, having authority to pledge her husband's credit, makes a contract, the first question to be considered will be for whom she was contracting: was it her own personal contract, or did she make it as agent only for and on behalf of her husband? This question is solved if it can be shewn that both parties intended credit to be given to the wife or the husband as the case may be; but in most cases the question is one of fact depending on all the circumstances of the transaction. The fact that credit is given to either the wife or the husband may be shewn in various ways. If the wife, having his authority, contracts expressly for her husband, the contract is his. But, if she does not, the nature of the contract, the previous course of dealings between the parties, the fact that the name of either is entered in the books of the third person as the contracting party—all these facts would be evidence to shew to whom the credit was given. The mere entry of the name of either party in the books of the third person and the making out of invoices in the same name, though evidence of an intention to give credit to that party, is not conclusive.”

Here the circumstances all point to the fact that credit was given to the wife and to her alone. For this reason the appeal should be allowed and the action should be dismissed as against the husband.

The plaintiffs have not appealed as to the judgment dismissing the action against the wife. The husband should have the costs of his appeal.

Appeal allowed.

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AMALGAMATED BUILDERS COUNCIL v. HERMAN.

March 25, *Constitutional Law—Trade Unions Act, R.S.C. 1927, ch. 202—Ultra Vires — Action by Registered Trade Union for Libel — Status of Plaintiff — Cancellation by Secretary of State of Certificate of Registry—Attack in Action to which Secretary not Party—Defamatory Statements not Relating to Business of Plaintiff—Conduct of Officers—Secs. 2, 3, 4, 8(2) of Act—Criminal Code, secs. 496, 497, 498—Statutory Legal Entity—Whether Juridical Person.*

The Trade Unions Act, R.S.C. 1927, ch. 202, is a statute dealing solely with property and civil rights, and therefore *ultra vires* of the Dominion Parliament and quite ineffectual to confer any valid status upon a trade union.

Comparison of the provisions of the Canadian Act with those of the English Trade Union Act of 1871, 34 & 35 Vict. ch. 31.

This action was brought by a trade union, registered under the Act, against the publisher of a newspaper, for defamatory writings said to have been published in relation to the business of the plaintiffs as a trade union. Some time after the action was brought, the Secretary of State issued a declaration that the registration was void and the certificate thereof was cancelled.

Held, that the Act (assuming it to be *intra vires*) contemplates cancellation by the Secretary of State of the certificate of registry; if he wrongfully cancelled it, his act must be directly attacked in some way—it cannot be attacked in an action to which he is not a party.

Quere, whether a registered trade union can sue for libel, and whether the immunity created by the Criminal Code, secs. 496, 497, and 498, applies to the undue enhancing of the price of commodities.

The statements complained of as defamatory charged tyrannous and oppressive action on the part of the officers of the union and proceedings whereby the price of certain commodities was unduly enhanced:—

Held, that the statements could not be regarded as relating to the business of the trade union.

A registered trade union is a statutory legal entity anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents, but it is not a juridical person.

Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426, *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, 191, and *Starr v. Chase*, [1924] S.C.R. 495, 508, referred to.

HEARING of certain questions of law, pursuant to an order dated the 28th January, 1930, and hearing of a motion to stay the action upon certain grounds.

February 24 and March 12 and 13. The questions and motion were argued before MIDDLETON, J.A., in the Weekly Court, Toronto.

W. N. Tilley, K.C., and G. L. Fraser, for the defendant.

W. F. O'Connor, K.C., and S. A. Hayden, for the plaintiff council.

No one appeared for the Minister of Justice or for the Attorney-General for Ontario, though duly notified.

March 25. MIDDLETON, J.A.:—This action is brought by the Amalgamated Builders Council, as a trade union registered under the Trade Unions Act, R.S.C. 1927, ch. 202, against the defendant, who is the owner and publisher of a newspaper called "The Border Cities Star." It is alleged that in August and September, 1929, the defendant published certain articles descriptive of proceedings taken before a Royal Commission at Sandwich on an investigation and of alleged improper conduct of the plaintiff council and its officers. These are said to be defamatory and to have been published with relation to the business of the plaintiff as a trade union and trade association. These articles, shortly, charge tyrannous and oppressive action on the part of the officers of the plaintiff organisation and proceedings whereby the price of certain commodities was unduly enhanced to the great detriment of the public and particularly of those competing in business with the members of the plaintiff organisation.

The plaintiff organisation was registered under the Trade Unions Act on the 8th June, 1928; but some time after this action was brought, to wit, on the 31st December, 1929, the Secretary of State and Registrar-General of Canada issued under his hand and seal of office a declaration of voidance and cancellation of the registration of the trade union, whereby it was declared that, in view of the findings and recommendations of the commissioner appointed by order in council to investigate the operations of the Amalgamated Builders Council and all other organisations therein specified, the purported registration of the Amalgamated Builders Council was void and the certificate of registry thereof was cancelled. A motion was thereupon made for an order permitting the defendant to set up the cancellation of the registration of the plaintiff organisation and to have determined certain questions of law, *inter alia* the question whether the cancellation of the certificate of registration put an end to this action, and an order was made permitting this question and the other questions of law suggested to be disposed of before the hearing. The plaintiff council had, however, the right to reply to the amended pleading as advised; but, instead of relying upon its contention that the certificate was invalid and inoperative, filed a reply denying the existence of the order in council, and when the question came on to be argued took objection that the legal question sought to be raised should not be determined because of this issue of fact.

The motion then stood over and a supplemental motion was made for a summary order staying the action upon the ground, among other grounds, that owing to the cancellation of the certificate the plaintiff had no longer any status in court. Although a

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long affidavit has been filed in answer to this motion, there is no doubt that in fact the Secretary of State did issue the certificate in question. This clears the situation so that I am called upon to determine all the questions raised.

An order having been made directing the question of the validity and effect of this cancellation to be argued, and, no appeal having been had from this order, I am probably bound to determine this question upon the argument of the first motion launched.

It will be convenient at this point to summarise the different matters argued.

First, it is said that, apart from the status conferred by registration, a trade union cannot maintain any action in its adopted name.

Second, that the Dominion statute already referred to cannot be relied upon as conferring a right to sue, as this is beyond the jurisdiction of the Parliament of Canada.

Third, that, even if registration conferred a right to sue, the cancellation of the registration effectually destroyed the right conferred, and this action should for that reason be either dismissed or forever stayed.

Fourth, that, even assuming the validity of the Dominion statute and the validity of registration thereunder, the registration did not confer upon the plaintiff council the right to bring an action such as this.

Fifth, that the articles complained of are not capable of being regarded as defamatory of the plaintiff, although they may be defamatory of officers of the plaintiff, the right of the plaintiff to sue for libel, if any, being confined to defamatory allegations relating to its funds and their business management.

It was conceded that, apart from the provisions of the Trade Unions Act, the plaintiff could not sue in its name. All other matters were stoutly contested. It is therefore necessary to look carefully at the provisions of the statute.

In 1871 the first Trade Union Act (34 & 35 Vict. ch. 31) was passed in England. The English Act has been frequently amended in vital particulars. In 1872 the Dominion statute was passed and it has remained unchanged. This is of great importance in contrasting the situation under the English Act with the situation under the Dominion Act, for, as a writer upon the subject in 1913 states, the changes made in the Act after the decision in *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, have been so radical and drastic that not only that decision but all the law on this topic, save the decisions of recent years, is in England obsolete.

It is also to be borne in mind that the English statute is enacted by an omnipotent legislature, while the Canadian Act was passed by a Parliament which has no jurisdiction over property and civil rights save as incidental to fields of legislation assigned to the Dominion.

The English Act of 1871 has as its leading provision the enactment (sec. 2) that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

The third section provides that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.

Many of the following provisions are negative in their character.

By sec. 4, nothing in the Act shall enable any court to entertain legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of enumerated kinds of trade agreements, but this shall not be deemed to constitute any of these agreements unlawful.

By sec. 5, the Friendly Societies Act and the Industrial and Provident Societies Act are not to apply to trade unions.

Section 6 provides that any 7 or more members of a trade union may cause the union to be registered, "provided that if any one of the purposes of such trade union be unlawful such registration shall be void."

Section 7 enables a trade union to purchase or lease lands.

By sec. 8, all the property belonging to the trade union is to be vested in trustees.

By sec. 9, these trustees, or any officer of the union authorised, may bring or defend any action touching or concerning the property of the union, and may be sued in all actions concerning the property of the union; and, by sec. 10, the trustee is relieved from liability save as to funds which actually reach his hands.

By sec. 11, the treasurers of unions are required to keep books and to account; and, by sec. 12, officers that withhold money, etc., may be punished.

By sec. 13, regulations for registering are made. Upon compliance with these regulations, a certificate of registration is to be granted; and, by subsec. 5, this certificate, "unless proved to have been withdrawn or cancelled, shall be conclusive evidence that the regulations of this Act with respect to registry have been complied with."

Section 14 makes provision for the rules of a trade union.

Section 15 makes provision for a registered office.

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The remaining sections of the Act deal with the making of returns, penalties for circulating false copies of the rules, penalties in respect of various matters, jurisdiction of magistrates and the mode of enforcement, appeal, etc.

The Canadian Act while based on the English Act has important matters of difference. The provisions relieving trade unions from illegality by reason of the agreement being in restraint of trade find a subordinate place in this Act. They are also found in the Criminal Code. In the Code there is a provision, sec. 498, which makes it an offence to combine or agree with any other person "(a) to unduly limit facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or (b) to restrain or injure trade or commerce in relation to any such article or commodity; or (c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property;" but by subsec. 2 it is provided that "nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection;" and by sec. 497 it is enacted that "the purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section" (496), which defines a conspiracy in restraint of trade as "an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade." This is of great importance from the constitutional view-point, because it renders it unnecessary to consider whether the provisions of the Trade Unions Act are capable of being supported by reference to the criminal law. The provisions deemed proper for the protection of trade unions from the harsh operation of the criminal law are found in the Criminal Code and not in the Trade Unions Act.

Turning now to the Trade Unions Act itself, there is first a definition of a trade union as meaning a combination for regulating the relations between workmen and masters, or imposing restrictive conditions on the conduct of any trade or business which would but for this Act have been deemed to be an unlawful combination by reason of some one or more of the purposes being in restraint of trade. This is followed by sec. 3, a provision that the Act shall not affect certain agreements not now material, and then by sec. 4, corresponding to sec. 4 of the English Act, providing that no court shall entertain actions to enforce certain agree-

ments of enumerated types; and then the remaining provisions, corresponding largely with the provisions of the English statute. Section 8, subsec. 2, referring to the Registrar's certificate of registry, provides, as in the English Act, that the certificate, "unless it be proved to be withdrawn or cancelled, shall be conclusive evidence that the regulations of this Act, with respect to registry, have been complied with."

The object of the English Act of 1871 as amended in 1876 is thus set out in the *Taff Vale* case, [1901] A.C. 426, by Mr. Justice Farwell (pp. 427, 428):—

"The Acts commence by legalising the usual trade union contracts, and proceed to establish a registry of trade unions, give to each trade union an exclusive right to the name in which it is registered, authorise it through the medium of trustees to own a limited amount of real estate, and unlimited personal estate 'for the use and benefit of such trade union and the members thereof;' provide that it shall have officers and treasurers, and render them liable to account; require that annual returns be made to the registry of the assets and liabilities and receipts and expenditures of the society; provide that it shall have rules and a registered office, imposing a penalty on the trade union for non-compliance; and permit it to amalgamate with other trade unions, and to be wound up."

In that case it was laid down that the trade union by registration became neither a corporation nor a partnership, nor an individual having capacity to own property and act by agents. It is an unique creation of the legislature, endowed with the capacity to own property, to sue and be sued, with a right to act by agent and with the right to call upon its agents to account. This has been stated in many differing ways from time to time.

The last case which has come to my attention is *Cotter v. National Union of Seamen*, [1929] 2 Ch. 58, 73, where the words of Lord Justice Farwell in *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163, 191, are quoted with approval:—

"A registered trade union is thus a statutory legal entity anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents."

I do not at all agree with Mr. O'Connor that this "anomalous entity" is a "juridical person." It is, I think, far less.

This analysis of the Acts makes it plain to me that the Dominion Act is nothing but a statute dealing solely with property and civil rights and therefore *ultra vires*, and for that reason quite ineffectual to confer any valid status upon the trade union. See

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what is said by Duff, J., in *Starr v. Chase*, [1924] S.C.R. 495, at p. 508: "As to many of its provisions there is, to say the least, doubt as to the authority of the Dominion to enact them."

If I should be wrong in this, it will be necessary to consider the effect of the cancellation of the certificate. From the sections quoted it is, I think, plain that the statute contemplates a cancellation of the certificate by the Secretary of State. If the Secretary of State wrongfully cancelled it, his action must be directly attacked in some way. It cannot be raised as a collateral issue in an action to which he is no party. Mr. Singer has made an affidavit charging the Minister with improper conduct in what has been done, and threatens a very long and serious attack upon those charged with the execution of important public duty. It is therefore of importance that the limits of what is open in this action should be investigated and dealt with at an early stage.

The question whether a registered trade union can sue for libel has not yet been determined. In the last (second) edition of *Gatley on Libel and Slander*, 1929, p. 470, that learned writer submits that a union should be held entitled to maintain an action for libel in respect of any words which tend injuriously to affect its property or its financial position. The words complained of here do not affect the property or the financial position of the plaintiff. This writer carries the matter much further than does *Slessor and Baker's Trade Union Law*, 3rd ed. (1927), p. 264, where it is said:—

"It is doubtful whether a trade union, illegal at common law, possesses a reputation entitling it to sue in libel, the legalising effect of sec. 3 of the 1871 Act appears to be limited to validating contracts and trusts."

Concerning this we have no legalising clause such as sec. 3, and it is very doubtful whether the immunity created by the Criminal Code applies to the undue enhancing of the price of commodities. This is something far beyond that which is validated—agreements which would have been unlawful "merely because in restraint of trade."

The last point I do not propose to deal with at any length. In my view the defamatory statements complained of cannot be regarded as relating to the business of the trade union as charged in the statement of claim. They probably are highly derogatory of individual officers of the union, but this is not now material.

For these reasons I answer the questions of law submitted in favour of the defendant and dismiss the action with costs, and in the alternative I make an order upon the second motion forever staying the action and directing the plaintiff to pay the costs of the defendant.

[APPELLATE DIVISION.]

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March 26.

Criminal Law—Search-warrant Issued in Ontario in Aid of Prosecution in another Province—Justice of the Peace—Jurisdiction—Criminal Code, sec. 629—Information on which Warrant Issued—Form of—Code, sec. 630(2) and Form 2—Grounds Stated in Information—Insufficiency.

A justice of the peace in the Province of Ontario has power to issue a search-warrant in aid of a criminal prosecution in another Province (MASTEN, J.A., expressing no opinion as to this).

History of the office of justice of the peace.

A police magistrate in and for the Province of Ontario, having all the powers of a justice of the peace, comes within the words "any justice" in sec. 629 of the Criminal Code.

Justices of the peace are not officers of the Province—they are the servants and officers of the King and of no one else.

The search-warrant issued by the justice in this case was addressed to "all or any of the provincial police in the Province of Ontario, and to all or any peace officers and constables in the said Province:"—

Held, that there was no necessity for naming the peace officer or officers to whom the warrant was directed, and the form followed was not objectionable (sec. 630(2) of the Code and form 2).

The information upon which the warrant was issued stated that the informant had reasonable grounds for believing that books of account and other papers and documents, loosely specified, would afford evidence of the offence alleged to have been committed in the Province of Alberta, and that they or some part of them were kept in the premises occupied by the defendants in the city of Toronto, and that the grounds of his belief were that he had been so "informed by a reliable informant, whose name, for reasons of public policy, he is not at liberty to disclose:"—

Held, that the grounds alleged were not sufficient to justify the magistrate in issuing the warrant.

An appeal by the Attorney-General for Ontario from an order of McEvoy, J., in Chambers (20th February, 1930), quashing a search-warrant issued by a police magistrate, the information upon which it was issued, and all proceedings thereunder.

March 12. The appeal was heard by RIDDELL, MIDDLETON, MASTEN, ORDE, and FISHER, JJ.A.

A. W. Rogers, for the appellant, argued that sufficient grounds were set out in the information before the magistrate to satisfy him that the warrant should issue. The statements in the information that books were sought which would afford evidence of the offence charged in Alberta were as specific as a police officer could make them. It would be impossible without lengthy examination for any one to say in what way these books would prove the commission of a crime. The name of an informant can always be withheld on grounds of public policy: *Humphrey v.*

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Archibald (1893), 20 A.R. 267; Archbold's Criminal Pleading Evidence and Practice, 27th ed., p. 483. A justice of the peace in this Province has power to issue a search-warrant in aid of a criminal prosecution in Alberta. Section 629(1) of the Criminal Code is very broad, and allows any justice, if he hears of there being anything in any place which will afford evidence of any offence, to issue a search-warrant. Whenever it is the intention that the Code shall restrict the jurisdiction of a magistrate, it says so in express words. There is nothing in the Code tying us down to the Province: *Rex v. Hoffman* (1923), 41 Can. Crim. Cas. 124. Although in general a penal statute must be strictly construed, yet the fair, commonsense meaning of the language is to be adopted: *Dyke v. Elliott* (1872), L.R. 4 P.C. 184. A search-warrant need not be directed to a particular officer: *Gaul v. Township of Ellice* (1902), 3 O.L.R. 438.

R. H. Greer, K.C., for the defendants, respondents, contended that the grounds set out in the information were not sufficient to justify the magistrate in issuing the search-warrant: *Rex v. Kehr* (1906), 11 O.L.R. 517, 11 Can. Crim. Cas. 52, at p. 60; *Regina v. Walker* (1887), 13 O.R. 83, at p. 95; *Rex v. Bender* (1916), 36 O.L.R. 378. As to the search-warrant, a justice of the peace in Ontario has no power to issue such a process in aid of a criminal prosecution in another Province: *Rex v. Jack* (1915), 24 Can. Crim. Cas. 385; *Rex v. Coyne* (1917), 28 Can. Crim. Cas. 428; *Re Joseph* (1924), 42 Can. Crim. Cas. 58.

Rogers, in reply, referred to the *Gaul* case, *supra*.

March 26. RIDDELL, J.A.:—The defendants are under indictment in the Province of Alberta for an alleged criminal offence, the particular kind of which is of no importance upon this motion. It being thought that evidence on behalf of the prosecution could be obtained from the books of account, etc., in the office of the accused in a certain building in Toronto, an information was laid by Inspector Hammond, of the Ontario provincial police, before General Williams, a police magistrate in and for this Province. Upon this information, the magistrate issued a search-warrant. A motion was made before Mr. Justice McEvoy to quash the search-warrant, several grounds being set out in the notice of motion. Upon this motion the learned Judge made an order in the following terms:—

"It is ordered that a certain search-warrant issued by the said police magistrate, V. A. S. Williams, bearing date the 18th day of February, 1930, issued on the information of E. D. L. Hammond, of the city of Toronto, a copy of which is filed with

the return of the said police magistrate, be and the same is hereby quashed and that the information upon which the said warrant was issued and all proceedings taken thereunder be and they are hereby quashed and set aside."

An appeal is now taken by the Crown.

It will be observed that the order made goes further than the notice of motion called for, in that it purported to "quash and set aside" the information—on the hearing before us, counsel for the accused abandoned this portion of the order as clearly not sustainable, and we pay no further attention to it.

The matters in controversy are really two: (1) the power of a justice of the peace in this Province to issue a search-warrant in aid of a criminal prosecution in another Province; and (2) the sufficiency of the information as a basis for the search-warrant. The latter is of little, if any, practical importance, but a decision is sought upon the former, which is of great public importance.

First, to deal with the question of jurisdiction—admittedly, the magistrate in this case had and has all the powers of a "justice of the peace;" he, consequently, comes within the meaning of the words "any justice" in sec. 629 of the Code.

As to his jurisdiction, we heard considerable argument based upon the history of the justice of the peace—this down to Blackstone's times is sufficiently given in the Commentaries, Book 1, pp. 349-356. While at the Common Law there were officers whose duties in a greater or less degree corresponded to those of the justice of the peace, the justice of the peace proper begins with the statute in 1360 of 34 Edw.III. ch. 1, which provided that for every county of England there should be assigned to keep the peace one Lord (*Seignur*) and three or four of the most worthy in the county (*trois ou quatre des meultz vauex du countes*), with some learned in the law; their jurisdiction was to try at the King's suit all manner of felonies and trespasses done in the same county: 1 Stats. at Large, p. 291. It is unnecessary to go through the statutory changes made from time to time; it is sufficient to say that it was not till 1788 that the jurisdiction, territorially, of the justice of the peace was enlarged beyond the boundaries of his own county—Lambard's *Eirenarcha* and Burn's *Justice* may be consulted if necessary as to these changes, along with Blackstone. The statute (1788) 28 Geo. III. ch. 49 gives jurisdiction to a justice acting as such for any two or more counties, being adjoining counties, to act in all matters in either or any of the counties, provided he is at the time a resident. This Act also made clear and extended the Act of 9 Geo. I. ch. 7, giving power to a justice of the peace

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for a city situated within a county to act as a justice within any part of the county.

At the time of the passing of this Act of 1788, this part of what is now Canada was part of the Province of Quebec, having been made such by the Quebec Act (1774), 14 Geo. III. ch. 83; some part of what is now the Province of Ontario was in the "Government" or Province of Quebec as originally constituted by Royal authority in 1763. For this small territory (bounded on the west by a line from the southern point of Lake Nipissing to about the present Cornwall), justices of the peace had been provided by the first Ordinance which established Civil Courts for the new Colony, namely, the Ordinance of the 17th September, 1764, passed by Governor Murray in Council—Shortt & Doughty, Constitutional Documents, etc., 2nd ed. (1918), pp. 207, 208—their jurisdiction, civil as well as criminal, was limited to the District for which they were appointed. The civil jurisdiction being taken away by the Ordinance of the 1st February, 1770, the territorial jurisdiction was not extended.

When Upper Canada began its separate existence, the justices of the peace had been deprived of their civil jurisdiction and their criminal jurisdiction had not been extended. So long as Upper Canada continued to be divided into Districts, their criminal jurisdiction was confined to their District; and neither the Act of (1792) 32 Geo. III. ch. 6 (U.C.), which gave certain civil jurisdiction to justices of the peace in Courts of Requests (the original of our Division Courts), nor that of (1832) 2 Wm. IV. ch. 4 (U.C.), which facilitated summary proceedings before justices of the peace, gave any further territorial jurisdiction.

Provision was made by 14 & 15 Vict. ch. 96 (Can.) and 16 Vict. ch. 179 (Can.) for backing warrants for use outside the jurisdiction of the magistrate issuing them; but, as will be seen from C.S.C. 1859, ch. 102, sec. 1, no extension of jurisdiction was given. The backing of process seems to have been first introduced in England by (1793) 33 Geo. III. ch. 55.

All this is, however, quite aside from the real question here, namely, the power of a justice of the peace in one Province to act in reference to the issue of a search-warrant to obtain documents, etc., for use in the trial in another Province of an alleged offender. It may be said at once that no express legislation appears giving this power in so many words; and I fail to see how the history, largely negative, of the powers of the justice helps to determine the question. The reasoning whereby it is attempted to exclude the jurisdiction of the justice of the peace in the present case seems to me to be based upon a misunderstanding of the true position of

such officers, i.e., the view that they are officers of the Province. It is true that the appointment of justices of the peace is made upon the recommendation—and, be it said, the responsibility—of the advisers of the Crown in the Province—the responsible Ministers of his Majesty for the Province, but they are appointed by his Majesty, through his personal representative; they are not the servants of the ministry, or of the Lieutenant-Governor, or of the Lieutenant-Governor in Council; they are the servants and officers of his Majesty and of no one else. There can be no reason why his Majesty in constitutional ways may not direct his servants to perform any duty not inconsistent with enactments, to which he or some predecessor was a party, limiting his authority. The Royal predecessor of his Majesty, in a constitutional way, i.e., “by and with the advice and consent of the Senate and House of Commons of Canada,” in 1892, directed that “any justice” was to perform certain duties in respect to search-warrants. She did not limit that duty to cases in which there was an offence against the Act committed or suspected of having been committed within the County, District, or Province, in which the justice had received the Royal Commission; nor has either of her Royal successors done so. Neither is there anything in the duty thus imposed upon the King’s officer in the least indicating that the duty is to be performed only if the alleged crime was charged as having been committed within the territorial district within which the ordinary duties of the justice are confined by law, evidenced by constant and invariable practice for centuries. I am, therefore, of the opinion that the justice had jurisdiction in the premises.

The objection to the form of the warrant is equally untenable—it reads: “To all or any of the provincial police in the Province of Ontario, and to all or any peace officers and constables in the said Province.” The Code, by sec. 630(2), provides: “Every search-warrant may be in form 2, or to the like effect.” Form 2 reads: “To the peace officers in the said county.” There is no necessity for naming the peace officer or officers to whom the warrant is directed, and it would seem clear that the form here followed is not objectionable. The warrant cannot be quashed for that reason.

But it is alleged that the information, which we hold cannot be quashed, is insufficient to justify the search-warrant.

The important parts of the information read:—

“(1) that books of account, ledgers, financial statements, documents, confirmations, share registers, exchange floor slips, and all other records of every description which there is reasonable ground to believe will afford evidence that I. W. C. Solloway and Harvey

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1930. at Calgary, in the Province of Alberta, did unlawfully conspire
v. each with the other or with Harold Hendrickson or L. L. Masson,
SOLLOWAY or with other persons unknown, by deceit or falsehood or other
AND fraudulent means, to defraud the public, contrary to the provisions
MILLS. of section 444 of the Criminal Code of Canada; and
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“(2) that he had reasonable grounds for believing that the said things will afford evidence of the said offence and that they or some part of them are kept in the premises occupied by Solloway Mills & Co. Ltd. (Dom., Ont., and Quebec companies) at the Metropolitan Bldg., by Oscar Hudson & Co., chartered accountants, Federal Bldg., and by the Standard Stock and Mining Exchange, Temperance-street, in the city of Toronto, county (or district) of York.

“(3) that the grounds of his said belief are that he has been so informed by a reliable informant, whose name, for reasons of public policy, he is not at liberty to disclose.”

No fault can be or is found with the description of the offence alleged; none is made of the non-disclosure of the name of the person who gave the information to the person who laid the formal information; but it is said that the grounds set out in the information are not sufficient to justify the magistrate in issuing the search-warrant.

It will be seen that sec. 629 provides that “Any justice who is satisfied by information upon oath in form 1, that there is reasonable ground for believing that there is in any building . . .” may issue a search-warrant. This, literally interpreted, would mean that whenever a justice is in fact so satisfied, whether he should have been so satisfied or not, he may issue the warrant. But the issue of the warrant is a judicial act, and, as such, in the absence of statutory prohibition, its propriety may be examined by competent authority, which competent authority we are; and it is our duty to examine not into whether the justice was in fact satisfied but into whether he should have been satisfied. Independently of authority, I think that, while we must make all allowances for differences of opinion, honest mistakes, and all other circumstances, we must say that here there was not sufficient for the justice to base a “satisfaction” upon. Not to mention the vagueness and generality of the statements in the information, the informant does not even pledge his oath to his own belief: *Rex v. Kehr*, 11 Can. Crim. Cas. 52, 11 O.L.R. 517. We are not to be taken as approving the statement (p. 524 of 11 O.L.R.), “belief at two removes is not sufficient,” as generally applicable, recognising that many of our most cherished beliefs are not better founded than

at two removes. Each case must depend upon its own facts. *Rex v. La Vesque* (1918), 30 Can. Crim. Cas. 190, *Rex v. Frain* (1915), 24 Can. Crim. Cas. 389, *Rex v. Bender*, 26 Can. Crim. Cas. 393, 36 O.L.R. 378, are all cases in which the necessity of setting out in the information—and it is to be remembered that the Code requires that the justice must be “satisfied by information”—sufficient to satisfy a reasonable man that there is “reasonable ground for believing” in the existence of what is alleged.

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In the present case, without laying down any rule more definite than as already indicated, we think that the magistrate should not have been satisfied by the information which was presented to him; we therefore think that the warrant was properly quashed, and that this appeal should be dismissed.

Nothing we have said is to be taken as a reflection upon the actions of the officers charged with the performance of exceedingly important as well as delicate duties, often most invidious, as they must be in the discovery and production of evidence bearing upon crime, actual or alleged; these duties, onerous as they are, must be performed by the officers under their responsibility to the representatives of the Crown; and in the last resort to the people of the Province—they are not subject to the direction of the Court, and we can pass on the legality only not the wisdom of their conduct.

MASTEN, J.A.:—This is an appeal by the Attorney-General from an order of McEvoy, J., dated the 20th February, 1930, quashing a certain search-warrant issued by Police Magistrate Williams, dated the 18th February, 1930.

The appeal comes to this Court under Rule 1287 of the Rules passed on the 27th March, 1908, under the provisions of the Criminal Code, R.S.C. 1906, ch. 146, sec. 576, now sec. 576 of R.S.C. 1927, ch. 36. (See 16 O.L.R. Appx. II.)

The Rules referred to relate to the quashing of criminal proceedings, including warrants, and the order made by a single Judge on an application to quash is made appealable, Rule 1287 providing as follows:—

“An appeal shall lie from the order of the Judge to a Divisional Court if leave be granted by a Judge of the High Court.”

Such leave was in this case granted.

The order of McEvoy, J., was supported upon two grounds: first, that the information on which the issue of the warrant was based does not contain such information as justified the issue of the warrant; secondly, that the criminal courts in each Province

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are limited to the confines of their respective Provinces save when given more extended jurisdiction.

I agree with the conclusion that this appeal should be dismissed on the ground that the information fails to disclose any evidence adequate to satisfy a magistrate that there is reasonable ground for believing that there is in any building, receptacle or place, anything which will afford evidence as to the commission of the offence in question. That ground alone suffices completely to dispose of the appeal, and an opinion on the other branch of the case would be obiter. For that reason I prefer to reserve my opinion on the latter question until it necessarily arises for decision. That observation however is not to be taken as implying either dissent from or assent to the views which have been expressed by other members of the Court.

MIDDLETON, ORDE, and FISHER, JJ.A., agreed with RIDDELL, J.A.

Appeal dismissed.

[WRIGHT, J.]

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BISSELL V. TOWNSHIP OF ROCHESTER.

March 26.

Highway—Nonrepair—Injury to Motorist—Cause of Injury—Negligence of Municipality—Contributory Negligence of Motorist—Apportionment of Fault—Contributory Negligence Act, R.S.O. 1927, ch. 103, sec. 3—Damages—Failure to Give Notice of Injury in Due Time—Evidence—Absence of Prejudice—Whether Reasonable Excuse Shewn.

In an action to recover damages for injuries sustained by the plaintiff in an accident upon a highway under the control of the defendant township corporation, it was found by the trial Judge that at the place where the accident happened the highway was in a dangerous condition and out of repair and that the nonrepair was the cause of the accident. He also found that the plaintiff was guilty of contributory negligence. He assessed the plaintiff's damages at \$1,200; and, being unable to apportion the respective degrees of fault, applied sec. 3 of the Contributory Negligence Act, thus fixing the plaintiff's damages, if recoverable, at \$600.

The plaintiff had failed to serve the notice required by sec. 468 of the Municipal Act, within the ten days allowed for service. The accident happened on the 9th August; the plaintiff was on the same day taken to a hospital, where he remained for five days; he was then removed to his home, but was not confined to his room, being able to walk about, although (he stated) he was suffering great pain. On the 21st August he consulted his solicitor, who prepared a notice, and the plaintiff himself on that day personally served the notice. It was not suggested that the defendants were prejudiced by the delay in service:—

Held, that the plaintiff had failed to shew reasonable excuse for failure to comply with the requirements of the statute.

To constitute reasonable excuse there must be such incapacity, either mental or physical, on the part of the injured person, as to render him incapable of discussing business affairs or giving instructions for the notice.

IN this action the plaintiff sought to recover from the Municipal Corporation of the Township of Rochester damages for injuries alleged to have been sustained by him in an accident upon a highway under the control of the defendant corporation.

The action was tried before WRIGHT, J., without a jury, at Sandwich.

G. L. Fraser, for the plaintiff.

J. H. Rodd, K.C., for the defendant corporation.

March 26. WRIGHT, J.:—The evidence established that on the 9th August, 1929, the plaintiff was driving an automobile on a highway in the township of Rochester when the automobile overturned and the plaintiff's left arm was fractured and lacerated.

The highway ran along the east side of the Ruscomb river and followed the course of that river in its various windings. Ordinarily the traffic on the highway was rather light, being confined chiefly to the farmers who lived along the road. At the time of the accident, however, a much larger volume of traffic was proceeding over the highway, owing to the fact that the approach to a bridge on the county highway known as the Base Line was under repair, and the highway in question was used as a *détour*.

The plaintiff alleges that the highway was out of repair and that such nonrepair was the cause of the accident. The evidence established that at the point where the accident occurred there was a sharp curve in the highway and that the surface of the travelled road was uneven, there being a ridge of considerable height in the centre and sloping to the east into a ditch 2½ feet deep.

The plaintiff testified that he was driving at about 27 miles an hour approaching the curve, and that when about 100 feet away he saw the curve and reduced his speed somewhat, but that when he got to the curve and attempted to make it his car skidded or slid to the east side of the road and his hind wheel went into the ditch. While he was endeavouring to get his car out of the ditch the car commenced swaying, and the left rear wheel got into a rut, causing the car to overturn. He stated that at the time of the accident the car was going at the rate of about 25 miles an hour.

There were no signs or signals to warn approaching motorists of the sharp curve, nor were there any railings or fences or posts to prevent automobiles going into the ditch.

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Taking into consideration the contour of the surface of the road and the sharp curve, I find that the place where the accident happened was dangerous and the road out of repair. There should have been signs warning approaching motorists of the sharp curve and there should also have been some railing or protection to prevent cars going into the ditch.

The condition of the surface of the road at the place in question was, in all the circumstances, dangerous and constituted non-repair.

These conditions undoubtedly caused the accident, and the defendants would but for the defence hereafter discussed be liable in damages.

On behalf of the defendants it was contended that the accident was caused or contributed to by the plaintiff's own negligence in driving at too high a speed.

The plaintiff was driving at an excessive rate of speed in view of the fact that he was not familiar with the road, this being his first trip over it, and in view also of the sharp curve, which could be seen at a considerable distance. He had ample time to reduce his speed so as to keep his car under control, and had he done so he could have avoided the accident.

I, therefore, find that the plaintiff was guilty of contributory negligence.

As a result of the accident the plaintiff suffered a fracture of his left arm and was confined to the hospital for five days. He was off work for seven or eight weeks, for which he claimed a loss of \$50 for eight weeks. His hospital and medical bills amounted to \$288.10. The repairs to his car and the bill for towing the same amounted to \$46.15, so that the actual loss to the plaintiff was \$734.25. Undoubtedly he suffered considerable pain, and the medical evidence was to the effect that he would not recover the full use of his left arm for some time. I would assess his damages at \$1,200.

As the findings are that there was negligence on the part of the defendant corporation which caused the accident and that the plaintiff was guilty of contributory negligence, it becomes necessary to apportion the respective degrees of fault as between the plaintiff and defendants. In the circumstances of this case I do not think that I could with certainty apportion the respective degrees of fault, so that the Contributory Negligence Act, R.S.O. 1927, ch. 103, sec. 3, will apply and the plaintiff's damages recoverable against the defendants will be fixed at \$600.

I have considered it desirable to deal with the foregoing aspects of the case in order that all the issues may be adjudicated upon,

before coming to a consideration of the defence most strongly relied on by the defendant municipality, namely, the failure of the plaintiff to serve the notice required by sec. 469 of the Municipal Act, R.S.O. 1927, ch. 233, within the time thereby specified.

As already stated, the accident happened on the 9th August, 1929, and the plaintiff was on the same day taken to the hospital, where he remained for five days. He was then removed to his home, but was not confined to his room, being able to walk about, although he states that he was suffering great pain. On the 21st August the plaintiff consulted his solicitor, who prepared a notice under the provisions of the Municipal Act relating thereto. The plaintiff drove out to the residence of the clerk of the township and personally served this notice.

There was no suggestion that the defendant corporation had been prejudiced in the slightest way by reason of the notice not being served within the ten days required by the statute, but it was contended on the part of the defendants that the plaintiff had not shewn any reasonable excuse for his failure to serve the notice within the time specified, and it falls to be decided whether or not such reasonable excuse has been shewn.

The authorities are not entirely in harmony as to what constitutes reasonable excuse.

In *City of Kingston v. Drennan* (1897), 27 Can. S.C.R. 46, the trial Judge held that there was reasonable excuse, and the Supreme Court upheld that finding. Sedgewick, J., in his judgment, at p. 61, says: "The rule is universal however that when a statute gives a judge discretion to do a particular act his decision will not be interfered with by an appellate court unless he has made a palpable mistake or has acted upon a manifestly erroneous principle." It should, however, be pointed out that in that case the plaintiff was in the hospital 24 weeks, and that during the first thirty days, the time within which the notice under the then existing statute should have been given, he endured great physical pain, so that the facts in that case are distinguishable from those of the present case.

The plaintiff's counsel also relied on the decision in *Morrison v. City of Toronto* (1906), 12 O.L.R. 333. A reference to the report in that case will shew that the plaintiff was confined in the hospital for three weeks after the accident, during two of which he was obliged to remain in bed, his condition being such that he was mentally incapable of giving the notice of the accident required by the statute. In those circumstances the trial Judge held that a reasonable excuse had been shewn.

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ROCHESTER. The plaintiff's counsel also referred to the case of *Howard v. South Vancouver*, [1924] 4 D.L.R. 257. That case is authority for the proposition that where the municipality is not prejudiced by the failure of the party injured to give the notice within the time required by the statute the Court ought to be astute in finding reasonable excuse. The dicta of Anglin, J. (now Chief Justice Anglin of the Supreme Court of Canada) in *O'Connor v. City of Hamilton* (1904), 8 O.L.R. 391, at p. 396, are cited with approval.

Counsel for the defendants relies strongly on the decision in *O'Connor v. City of Hamilton* (1905), 10 O.L.R. 529, and I am of opinion that the decision in that case supports his contention.

Another case that is helpful is *Fuller v. City of Niagara Falls* (1920), 48 O.L.R. 332. In that case the Appellate Division upheld the judgment of the trial Judge, who dismissed the action owing to the failure of the plaintiff to give the notice. The late Sir W. R. Meredith, C.J.O., at p. 340, points out that in that case the injury was from the first a serious one, and therefore there could have existed in the mind of the plaintiff no doubt that she would make a claim for compensation at some time, and that the plaintiff failed to bring her case within the rule referred to in some of the cases cited.

In *Wallace v. City of Windsor* (1916), 36 O.L.R. 62, the Appellate Division was equally divided, but in the result the judgment of Middleton, J., was upheld. That learned Judge held that it could not be said that the plaintiff was in any such condition as to be incapable of considering her situation except as a sufferer; and that, I think, aptly describes the situation here.

Another case similar in some of its features to the case at bar is *Anderson v. City of Toronto* (1908), 15 O.L.R. 643, where the late Chancellor Boyd adopts the view taken by the trial Judge in *Morrison v. City of Toronto*, that a sufficient excuse exists if the nature of the injury is such as to cause the plaintiff to become for the time incapable of considering his situation except as a sufferer. He further states that there was nothing in the case under consideration to shew that the injured party was so affected or prostrated that he was physically or mentally incapacitated from giving the notice or directing that it should be given.

Egan v. Township of Saltfleet (1913), 29 O.L.R. 116, has some features similar to those in the present case. The trial Judge there held that the failure to give notice prevented the plaintiff from recovery, and this judgment was upheld by the Appellate Division. The condition of the plaintiff in that case is stated by the late Sir William Meredith, C.J.O., at p. 118, as follows: "For upwards of two weeks there was nothing in the physical con-

dition of the appellant to prevent his complying with the requirements of the statute, and there was nothing done by the respondent which misled the appellant."

Another case in point, which was not cited on the argument, is *Faught v. The King* (1927), 32 O.W.N. 327, in which, at p. 328, Mr. Justice Kelly, in delivering judgment holding that there was no reasonable excuse, makes the following statement as to the evidence: "There was nothing to indicate that the Crown was prejudiced in its defence; but it was not shewn that either of the plaintiffs was, during the ten days, incapable of discussing business affairs or was in any way incapacitated from giving instructions for the notice."

There were other cases cited by counsel on the argument, but I think the foregoing are the most instructive.

It is exceedingly difficult to lay down any general rule, as the circumstances in each particular case must in the last analysis be the guide to the decision, but I venture to suggest that if there is any principle to be extracted from the decisions, it is that to constitute reasonable excuse there must be such incapacity, either mental or physical, on the part of the injured party, as to incapacitate him from discussing business affairs or from being able to give instructions for the notice.

In the present case the plaintiff admitted that after he was removed from the hospital he was walking around his house some hours each day and that he had a telephone available. It is worthy of note that on the twelfth day after the accident he was able to go down to his solicitor's office and consult him and drive out some distance to serve the notice on the clerk of the defendant township.

In view of all the circumstances of the case, I am of the opinion that the plaintiff has failed to shew reasonable excuse for failure to comply with the requirements of the statute as to the giving of the notice, and it follows that the plaintiff's action must be dismissed, but without costs.

[WRIGHT, J.]

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Evidence—Action against Executors of Deceased Person—Corroboration—Evidence Act, R.S.O. 1927, ch. 107, sec. 11—Circumstances Affording Corroboration—Evidence Meeting Defence Set up by Defendants.

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The plaintiff (a real estate agent) sued the executors of a deceased person for the amount of a commission upon an exchange of prop-

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erties effected between the deceased and one C. The defendants alleged that the plaintiff was disintituled to receive a commission because he had entered into an agreement with C. whereby the latter was also to pay him a commission, and had not disclosed the arrangement to the deceased. The plaintiff testified that before the transaction was closed he had informed the deceased that he was getting a commission from C. The making of the agreement for commission with the deceased being corroborated:—

Held, that, if the plaintiff in presenting his own case furnishes corroborative evidence sufficient to satisfy the requirements of sec. 11 of the Evidence Act, he is not required to furnish evidence corroborative of his own testimony given in meeting a defence.

The corroboration which the statute requires is not corroboration of every material fact which is required to be proved in order to entitle the party to succeed, but only of such material facts as lead to the conclusion that the testimony of the party is true.

McGregor v. Curry (1914), 31 O.L.R. 261, followed.

In the present case, there were circumstances which corroborated the testimony of the plaintiff as to the knowledge of the deceased that the plaintiff was getting a commission from C.—and corroboration may be afforded by circumstances.

AN action brought by a real estate agent to recover from the executors of Eugene T. Mailloux, deceased, a commission upon an exchange of properties.

The action was tried before WRIGHT, J., without a jury, at Sandwich.

J. E. Zeron, for the plaintiff.

W. D. Roach, for the defendants.

March 26. WRIGHT, J.:—This is an action brought by the plaintiff, a real estate agent at Windsor, to recover commission from the executors of the last will and testament of Eugene T. Mailloux, deceased.

In July, 1929, the testator entered into an agreement with Mr. David A. Croll, of Windsor, for the exchange of certain properties in that city. The deceased had employed the plaintiff in the negotiations, and he was also employed by Mr. Croll. When the agreement of exchange was signed, the deceased entered into an agreement in writing to pay the plaintiff a commission of 2 per cent. on the price at which his property was placed, namely \$70,000, which would make the commission \$1,400. Of this amount \$250 was paid.

During the course of the negotiations it was found that there was a misdescription of some of the property which was stated in the agreement to be owned by Mr. Croll, but the mistake was rectified and negotiations for the completion of the purchase were continued up to September, 1929. The testator met his death by drowning on the 28th July, 1929, and after his death it was dis-

covered that he was a joint tenant of the property only, his wife, Annie Mailloux, being the other joint tenant, and it was stated that she declined to carry out the agreement of exchange.

The plaintiff had performed everything on his part necessary to entitle him to be paid his commission.

The defence set up in the pleadings was that the plaintiff had never procured a purchaser ready, able, and willing to complete the purchase, but the evidence at the trial disproved this allegation, and it was practically admitted by counsel for the defendants that this branch of the defence failed.

At the trial, however, counsel for the defendants obtained leave to amend their statement of defence by alleging as a defence that the plaintiff was disentitled to receive any commission on account of the fact that he had entered into an agreement with Mr. Croll, the other party to the exchange, whereby the latter was to pay him a commission of \$600, and had not disclosed this arrangement to the deceased Eugene T. Mailloux at the time of the agreement, or before the execution of the agreement to pay the plaintiff a commission.

The plaintiff testified that before the deal was closed he had informed the deceased that he was getting a commission of \$600 from Mr. Croll. He further testified that this was the reason why the commission payable by the deceased was fixed at 2 per cent. instead of 3 per cent., the usual rate.

I accept the evidence of the plaintiff that he informed the deceased of the agreement with Mr. Croll for the payment by the latter of commission, when or before the agreement sued on was made.

Upon the argument the questions in issue narrowed down to a single point, viz., whether or not corroboration was required of the plaintiff's evidence that he had informed the deceased of the arrangement as to commission with Mr. Croll, the other party to the agreement.

There was no question that the plaintiff's evidence as to the agreement to pay the commission was amply corroborated, within the Evidence Act, R.S.O. 1927, ch. 107, sec. 11, and this was not at all disputed by counsel for the defendants, but he contended that it was necessary for the plaintiff to produce corroborative evidence on every issue raised between the parties, whether in support of his claim or in meeting any defence set up by the defendants. He relied strongly on the decision of the First Divisional Court in *Elgin v. Stubbs* (1928), 62 O.L.R. 128, and *Thompson v. Coulter* (1903), 34 Can. S.C.R. 261.

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There may be some dicta in these cases which support the defendants' argument, but I think a careful reading of them will shew that in neither case did the Court intend to hold that every fact necessary to entitle the plaintiff to succeed requires corroboration.

In *Elgin v. Stubbs*, Mr. Justice Hodgins, who delivered the judgment of the Court, says at p. 135:—

"I think the reasonable conclusion from these judgments, having regard to the language used in the *Bastardy* case, which is almost in the words of our statute, is that the corroborating evidence must be of some fact essential to the success of the plaintiff in obtaining a verdict, judgment, or decision in his favour, though it is not required that all such facts must be corroborated."

In *Thompson v. Coulter*, at p. 263, Killam, J., in delivering the judgment of the Court, says:—

"In my opinion this enactment" (referring to the Ontario Evidence Act) "demands corroborative evidence of a material character supporting the case to be proved by such 'opposite or interested party' in order to entitle him to a 'verdict, judgment or decision' . . . At the same time the corroborating evidence need not be sufficient in itself to establish the case."

The only case which I can find where the exact point raised in this case has been discussed is *McGregor v. Curry* (1914), 31 O.L.R. 261. In that case a very similar question was raised for decision. There the plaintiff's evidence as to the agreement was corroborated, but it was sought to defeat his claim by shewing that he had been guilty of laches in bringing his action. To this defence he gave an explanation which was not corroborated, but the Court held that, notwithstanding the lack of corroboration of this explanation, his evidence could be accepted and acted upon. The dictum of the late Sir W. R. Meredith, C.J.O., at p. 270, is particularly applicable to the discussion here. The learned Chief Justice there summarised the situation as follows:—

"The testimony of the respondent as to the reasons for the delay was not corroborated by other testimony; but, in my opinion, it was not necessary that it should have been, as his testimony as to the main question, the making of the agreement, was so corroborated, and the corroboration which the statute requires is not corroboration of every material fact which is required to be proved in order to entitle the party to succeed, but only of such material facts as lead to the conclusion that the testimony of the party is true."

At pp. 272 and 273, Mr. Justice Hodgins deals with or dis-

cusses the very question now in review. He states his opinion as follows:—

“The statute prevents recovery upon the evidence of the opposite party alone ‘unless such evidence is corroborated by some other material evidence.’ As the respondent has proved a contract and properly corroborated his evidence, he would be, *primâ facie*, entitled to succeed. Is that not all the statute requires? As the statute has been construed in the cases upon the subject, corroborative evidence is not required as to every fact necessary to enable the opposite party to recover. It is enough if sufficient relevant facts and circumstances appear, which tend to prove that the evidence relied on for recovery is true, or probably true, in some material particular. . . . But the respondent’s whole testimony, both in proof of his claim and in disproof of the defence, is the evidence upon which he recovers. Applying the cases referred to, if any part of that whole evidence is corroborated the statute is satisfied. . . . If not it would seem a great injustice, where a case is proved and sufficiently corroborated, if the person thus establishing liability is disabled from meeting a defence which only arises upon the assumption that such liability is established by the corroborative evidence. I do not think the statute requires or authorises that handicap. If a plaintiff proved his case on a promissory note against a party deceased, by corroborative evidence, and the defence made was that it was paid, it would be monstrous if the plaintiff could not give effective answer, that the alleged payment was upon another debt, without corroboration. The essence of the statute is that the Court shall receive assurance that the plaintiff’s own testimony is true, by other material evidence, and, having believed him in his original case, I cannot bring myself to the belief that the Court is not then at liberty to believe him in reply.”

I am of opinion that the decision in *McGregor v. Curry* concludes the question raised in this case in favour of the plaintiff, and I take the effect of such decision to be that if the plaintiff in presenting his own case can furnish corroborative evidence sufficient to satisfy the statute he is not required to furnish evidence corroborative of his own testimony in meeting a defence.

In any event there are facts and circumstances in connection with the case at bar from which I think corroboration may be found as to the knowledge of the deceased that the plaintiff was receiving a commission from Mr. Croll.

It was stated in argument by counsel for the defendants that the deceased Eugene T. Mailloux was a business-man of wide experience, being manager of a chain of stores, and had several

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deals in real estate in the city of Windsor. It was also testified by Mr. Croll, who was called as a witness for the defence, that the plaintiff had disclosed to him that he was receiving a commission from the deceased Mr. Mailloux. I think from these facts it might reasonably be inferred that the deceased Mailloux would know of the arrangement with Mr. Croll to pay a commission, and, as stated by Mr. Justice Osler in *Culverwell v. Birney* (1887), 14 A.R. 266, at p. 281, "it may be less difficult in the case of an exchange of lands to infer knowledge on the part of the vendor or vendee that the broker he employs is the paid agent of the opposite party and receiving a commission for making for that party the best bargain he can, and the assent of the vendor to employ the broker on those conditions."

There are several cases in which the principle or doctrine has been enunciated that direct testimony is not necessary but that corroboration may be afforded by circumstances: *Thompson v. Coulter*, 34 Can. S.C.R. at p. 263; *McDonald v. McDonald* (1903), 33 Can. S.C.R. 145; *Green v. McLeod* (1896), 23 A.R. 676.

It follows from what I have already stated that I am of the opinion that the plaintiff has furnished sufficient corroborative evidence and is entitled to succeed on his claim.

There will be judgment for the plaintiff for \$1,150 and costs.

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CITY OF TORONTO v. THE KING.

March 28. *Constitutional Law—Fines—Criminal Code, sec. 1036, Proviso—Ultra Vires of Dominion Parliament—British North America Act, secs. 91 (27), 109.*

The proviso to sec. 1036 of the Criminal Code, enacting that the fines referred to therein shall be paid to the municipal authority, is not within the powers of the Parliament of Canada (LATCHFORD, C.J., and ORDE, J.A., dissenting).

Meaning of the word "royalties" in sec. 107 of the British North America Act, considered.

Review of the authorities.

Judgment of ROSE, J. (1929), 64 O.L.R. 129, reversed.

AN appeal by the Crown, represented by the Attorney-General for Ontario, from the judgment of ROSE, J. (1929), 64 O.L.R. 129.

November 22, 1929. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

Edward Bayly, K.C., and *W. B. Common*, for the appellant, argued that sec. 109 of the British North America Act gives to the Province the "royalties" belonging to the Province of Canada at the Union. The fine in question was such a "royalty," and consequently any Dominion legislation which attempted to deprive the Province of this fine was *ultra vires*: *Reference re Waters and Water-powers*, [1929] S.C.R. 200; *Rex v. Attorney-General of British Columbia*, [1924] A.C. 213; *Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767; *Dyke v. Walford* (1846), 5 Moore P.C. 434, 70 R.R. 75.

G. R. Geary, K.C., and *J. Johnson*, for the suppliants, respondents, contended that this fine was not a "royalty," but was a creature of the statute. The creation and disposition of fines is part of the criminal law, and so comes under the jurisdiction of the Dominion Parliament. When that Parliament creates a fine, it is competent to give to this creature such disposition and direction as it wishes: *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524, at p. 529.

Bayly, K.C., in reply, contended that a fine which was imposed by a statute became a "royalty," and was the property of the Province.

March 28. LATCHFORD, C.J.:—This appeal is from the judgment of Rose, J., rendered on the 23rd April, 1929.

The facts are fully stated in the report of the judgment appearing in 64 O.L.R. 129, and need not be repeated.

Were it not for the decision of the Judicial Committee in *Rex v. Attorney-General of British Columbia*, [1924] A.C. 213, affirming the judgment of the Supreme Court of Canada, *Attorney-General for British Columbia v. The King* (1922), 63 Can. S.C.R. 622, the appeal would not, I think, present any serious difficulty. It was there held that the word "royalties" in sec. 109 of the British North America Act is not limited in its scope to the words preceding it, "lands, mines, minerals," but must be construed in its natural sense as the equivalent in English of "*jura regalia*," and therefore included what were, upon the admission of both the parties to the litigation, *bona vacantia*. Their Lordships, however, declined to express an opinion as to whether the words "belonging to" in sec. 109 mean "already in fact appropriated," or only "such as the Province was entitled to appropriate." They thought it, they said (p. 221), "sufficient to observe that this question, which is substantially one of fact, has not been established in favour of the Dominion in the sense of the argument

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advanced on its behalf, and that the point must be taken to have failed for the purpose of the present appeal."

Their Lordships were also careful to confine the expression of their opinion to *bona vacantia*, the case in hand, leaving other *jura regalia* to await decision till the cases should arise.

The fine in question in the present case is, I think, one of the *jura regalia* or "royalties" still awaiting decision, and that on two points: Was it a royalty "belonging to the Province at the time it was imposed?" And, if so, does it fall within the ambit of sec. 109, as did the *bona vacantia* in the British Columbia case?

I am of opinion that the fine, even if a royalty, is not a royalty that was at any time "belonging to" the Province.

Its imposition was pursuant to sec. 1035, subsec. 2, of the Criminal Code. Apart from the *constitution* of courts of criminal jurisdiction, criminal law, in its widest sense, is reserved by sec. 91(27) of the British North America Act, in clear and intelligible words, for the exclusive authority of the Dominion Parliament. Such is, in substance, the declaration of the Judicial Committee, as expressed by the Lord Chancellor, in *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524, at pp. 528 and 529.

The fine was not the result of any prerogative right enjoyed by the Province, but of the exercise of a jurisdiction restricted to the Dominion. As it was never "belonging to" the Province, it did not fall within sec. 109 of the British North America Act, but was in my view as properly the subject of Dominion legislation as any other penalty prescribed in the enactment of criminal law. It therefore seems to me that it was within the power of the Dominion to enact clause (b) of sec. 1036 of the Code and to direct that where, as in Toronto, the municipal authority wholly or in part bears the expense of administering the law under which the fine was imposed, the fine shall be paid over to the municipality.

Accordingly, I think that the appeal fails, and that it should be dismissed with costs.

RIDDELL, J.A.:—This is an appeal by the Crown, as represented by the Attorney-General for the Province of Ontario, against the judgment of Mr. Justice Rose, 64 O.L.R. 129.

There is no dispute as to the facts, historical or otherwise: in 1791, the Province of Quebec—which itself was enlarged by the Quebec Act of 1774, 14 Geo. III. ch. 83 (Imp.), beyond the limits of the original Government of Quebec, formed without delay after the formal cession of Canada by the Treaty of Paris, 1763, so

as to take in what is now the Province of Ontario—was divided by order in council into two Provinces, those of Upper and Lower Canada, the government of which was provided for by the Canada or Constitutional Act of 1791, 3 Geo. III. ch. 31 (Imp.) By the Union Act of 1840, 3 & 4 Vict. ch. 35 (Imp.), the two Provinces were united into the Province of Canada. In the seventh decade of the last century, after much negotiation and discussion, the statesmen of Canada, in conjunction with those of the separate Provinces of Nova Scotia and New Brunswick, formulated a scheme for the Confederation of these Provinces into a new political entity—the admission of other parts of British North America being contemplated and, in part, provided for. This scheme, which was in the Imperial Parliament called, and which was in fact, “a treaty of union” (185 Hansard 558), “a compact between the colonies” (*ib.* 1191), was put into the form of an Act of Parliament in order to make it legally binding. The British North America Act (1867), 30 & 31 Vict. ch. 3 (Imp.), is the result. *Inter alia*, the Province of Canada was redivided and two Provinces formed of its territory, Ontario and Quebec, corresponding to the former Provinces of Upper and Lower Canada.

Section 91 (27) gives the Dominion exclusive powers to deal with: “The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.”

Section 109 of this Act reads:—

“All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.”

In 1922, the Dominion Parliament, in ostensible pursuance of its powers contained in this section, 91(27), passed an Act (12 & 13 Geo. V. ch. 16) amending the Criminal Code, which, by sec. 8, provides as follows:—

“Subsection 1 of section 1036 of the said Act as amended by chapter 9 of the statutes of 1909 is amended by adding the following proviso at the end thereof:—

“Provided, however, that with respect to the Province of Ontario the fines, penalties and forfeitures and proceeds of estreated recognizances first mentioned in this section shall be paid over

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to the municipal or local authority where the municipal or local authority wholly or in part bears the expense of administering the law under which the same was imposed or recovered."

The full legislation on this matter is now sec. 1036 of the Criminal Code, R.S.C. 1927, ch. 36.

This special legislation, affecting the Province of Ontario only, was passed pursuant to petitions from numerous municipalities in this Province, and was not, as has been thought and, indeed, has been said by some, passed at the instance of the Government of Ontario. Had it been, it would make no difference in the result, as the Crown is not bound by estoppel. The reason for this special provision for the Province of Ontario was stated in the House of Commons by a leading member—that in Ontario, differing from Quebec, the municipalities build the court-houses and maintain them, and it was thought right that the municipalities should have this slight recompense (Can. Hansard (1922), vol. III., p. 2832).

The legislation above stated seems to have been acquiesced in for some time by the Province, but again that is of no importance—*Nullum tempus occurrit regi*—even if such acquiescence would be of any consequence in the case of a private individual, and I do not suggest that it would. The parties are not hampered by anything technical in their way to determine the rights of each. We have nothing to do with the reason of the legislation—the language being plain, we have simply to determine its meaning and see if the legislation is within the ambit of the powers of the enacting body.

The argument of the Crown is very clear—the British North America Act expressly gives to the Province the "Royalties belonging to the . . . Province of Canada . . . at the Union," and goes on to provide that "all sums then due and payable for . . . royalties shall belong to the Province of Ontario . . . " if "the same are situate or arise" there. Then it is claimed (1) that fines of this kind come within the meaning of the word "Royalties," and that (2) they belonged to the Province of Canada at the Union—consequently, it is argued that the Dominion Parliament has attempted to take away the property of the Province. If this were so, admittedly the legislation would be invalid.

The learned trial Judge finds that a fine imposed in a criminal case is a *Jus Regale*, a "Royalty," and as to that I think there cannot be the slightest question; and, indeed, had there been any necessity to do so, he might have gone further and found that a fine in a civil case also comes within the meaning of the words—the old Year Books are full of cases in which one party or the

other in a civil case is made to pay a fine to the King, for failure to prove a case or to proceed with it, or bringing a useless action or defending one that is defenceless, etc., etc.; generally, indeed, the fine for the party "*in misericordiâ*" was only *dim.m.*, half a mark, 6s. 8d., but even 6s. 8d. was a lot of money six centuries ago.

The next question is whether the word "Royalties" covers only concrete moneys accrued due at the time of the Union, or does it mean also the right to receive moneys of a certain character as and when they become due? Even independently of authority, I should think it clear that the word is not confined in its meaning to concrete moneys already accrued due, but includes the right to moneys of this character as and when they accrue due from time to time; the section quoted makes a provision for what has already accrued due, and the provision we are now considering is additional. But whatever doubt there might otherwise have been is dissipated by the decisions of the Judicial Committee in *Attorney-General of Ontario v. Mercer*, 8 App. Cas. 767, and *Rex v. Attorney-General of British Columbia*, [1924] A.C. 213.

These views are in accord with those of the learned trial Judge; and his judgment is to be supported in these respects. It is, I think, clear that a fine imposed in a criminal proceeding is within the meaning of the word "Royalties" in the Act, and that the word goes so far as to include the right to receive a fine, as and when imposed.

The learned Judge, however, decides that this right was not a right belonging to the Province of Canada at the time of the Union—it is not contended that the right lost its appellation of "Royalty," nor could it do so; even if granted to another, it still retained the name—*Dyke v. Walford*, 5 Moo. P.C. 434—as "the King's Silver" continued to be paid after the King had lost his head at Whitehall, and the money was payable "to the State:" "An Action at Law in the Time of the Commonwealth," 7 N.Y. Univ. L.Q. Rev., p. 74. But, while there is often much in a name, it cannot be said that the retention of the name "Royalty" gives any right to the Province in itself—it is only such "Royalties" as belonged to the Province of Canada at the time of the Union that the Province can claim as its own; Mr. Justice Rose (64 O.L.R. at p. 131) adopts the statement of law in Comyns's Digest, D. 55: "The King, by his prerogative, shall have all fines . . . imposed for crimes;" but thinks that, nevertheless, he was not entitled to this kind of fine at the time of the Union; he cites the C.S.U.C. 1859, ch. 118, as shewing that fines in certain cases were not payable to the Crown in Upper Canada at the time of the Union;

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but, with great respect, I think that that is *nihil ad rem*. Even supposing that a statutory direction to pay the fine in such a case as this to the treasurer of the county or other person, would take the fine out of the category of "Royalties belonging to the Province"—and I am not to be considered as agreeing to that proposition—there is no such provision in the case of a fine of this character.

The statute directs that:—

"1. In all cases not otherwise provided for in which, by the criminal law of England in force in Upper Canada, the whole or any part of a fine or penalty imposed for the punishment of any offence is in any manner appropriated for the support of the poor, or to any parochial or other purpose, inapplicable to the existing state of Upper Canada, such fine or penalty, or the part thereof so appropriated, shall when received be paid to the Treasurer of the County or Chamberlain of the City in which the conviction has taken place, to be appropriated to the purposes thereof, and accounted for in the same manner as the general rates and assessments levied therein are applicable and accountable by law.

"2. Every fine and penalty imposed for the punishment of any offence prohibited by any statute having force of law in Upper Canada only, and for the appropriation of which fine or penalty no other provision is made, and any duty or sum of money and the proceeds of any forfeiture by any such statute given to the Crown shall be paid into the hands of the Receiver General and shall form part of 'The Consolidated Revenue Fund.'

"3. All fines and penalties imposed upon and levied in the several Counties in Upper Canada, not payable to the Receiver General or to any Municipal Corporation, and all fines upon Jurors for non-attendance levied therein, shall be paid to the Treasurers of each of the said Counties respectively, and shall form part of the fund for the payment of Petit Jurors."

The fine here in question was imposed after a conviction for conspiracy to defraud: *Rex v. Jarvis* (1925), 28 O.W.N. 81. "The criminal law of England in force in Upper Canada" was "The Criminal Law of England, as it stood on the 17th day of September in the year of our Lord 1792 . . . as modified . . . by any Act of the Imperial Parliament having force of law in Upper Canada" or by Canadian statutes: C.S.U.C. 1859, ch. 94, sec. 1.

By the criminal law of England as it stood on the 17th September, 1792, the day of the opening of the first Legislature of Upper Canada, which it was that formally introduced the English civil law into the Province, leaving the criminal law of the former

Province of Quebec in force—in those days, a statute had its beginning with the first day of the enacting Parliament unless otherwise stated in the statute itself—this criminal law being practically the same as the English criminal law, as the Quebec Act of 1774 changed only the law in civil cases, leaving the English law as introduced by the Royal Proclamation of 1763 in full force.

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On the 17th September, 1792, conspiracy to defraud was a Common Law offence—Russell on Crimes, 8th ed., pp. 171 *sqq.*, and cases cited—the statutes dealing with conspiracy being directed against quite another class of offences: (1300) 28 Edw. I., St. 3, ch. 10; (1305) 33 Edw. I., St. 2; *do., do.*, St. 3; (1420) 7 Hen. V.; (1548) 2 & 3 Edw. VI. ch. 15. This Common Law crime was punishable by fine and imprisonment, and there was no provision in the English law that the fine or any part of it should be “appropriated for the support of the poor, or to any parochial or other purpose”—accordingly this offence does not come within sec. 1 of the statute quoted.

Whether it comes within sec. 2 is wholly immaterial—it does not, in fact—if it comes within this section, the fine is payable to the Receiver-General for the King (Queen); if not, it is unprovided for, and the Common Law rule applies, that the fine goes to the King (Queen).

It follows that, at the time of the Union, the fine for this offence went to the King, that is, in Canada, to the Public Treasury: it was a *Jus Regale*, the right to receive it a “Royalty;” and this right is the property of the Province, which cannot be taken away from the Province by the Dominion.

If the disposition of a fine comes within the words in sec. 91 (27) “The Criminal Law,” at all, these words must be read as limited by the provision giving “Royalties” as property to the Province.

I cannot think that because “Royalties” of much the same character as fines, in another class of offences, are given to others, the Dominion is therefore empowered to take away this property from the Province. I would allow the appeal with costs here and below.

MASTEN, J.A.:—Appeal by the Crown, represented by the Attorney-General for Ontario, from a judgment of Rose, J., dated the 23rd April, 1922, by which it was adjudged that a certain fine amounting to \$60,000 imposed on one found guilty of conspiracy to defraud, and paid to the Registrar of the Supreme Court and

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by him to the Provincial Treasurer of Ontario, was the property of the respondents, the Corporation of the City of Toronto.

As stated by the learned trial Judge, there is only one question for determination, viz., whether it was within the power of Parliament of Canada to enact that the fines referred to in the proviso to sec. 1036 of the Criminal Code, should be paid to the municipal authority.

The sentence imposing the fine in question was pronounced on the 24th October, 1924, and, as varied, was affirmed by a Divisional Court on the 23rd day of March, 1925. On those dates the statutory provisions which had been enacted by the Parliament of Canada, and by the Legislature of Ontario, respectively, read as follows:—

Section 1036 of the Criminal Code, R.S.C. 1906, ch. 146, as amended prior to 1924, enacts that:—

“Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any law or of the proceeds of an estreated recognizance, the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the Province in which the same is imposed or recovered, except” (here follow certain exceptions not material to this case).

“Provided, however, that with respect to the Province of Ontario, the fines, penalties and forfeitures and proceeds of estreated recognizances first mentioned in this section, shall be paid over to the municipal or local authority where the municipal or local authority wholly or in part bears the expense of administering the law under which the same was imposed or recovered.”

(It is common ground that the respondent corporation bears in part the expense of administering the law under which the fine in question was imposed).

The Fines and Forfeitures Act, R.S.O. 1914, ch. 99, sec. 5, provides that:—

“Every pecuniary fine and penalty imposed for a contravention of any statute in force in Ontario and the proceeds of every forfeiture imposed and given to the Crown by any such statute shall, where the disposal thereof is within the power of this Legislature, and except so far as other provision is made in respect thereto, be paid to the Treasurer of Ontario and shall form part of the Consolidated Revenue Fund.”

No amendments were made to the above section from 1914 until 1926.

These enactments are in conflict and raise the question, in the present appeal, which of them is constitutionally valid?

On the part of the appellant, the Attorney-General for Ontario, the contention is made that fines are royalties, and that under sec. 109 of the British North America Act all royalties to which the Provinces of Canada were entitled at the time of Confederation passed, according to their location, to the Province of Ontario or to the Province of Quebec; that sec. 109 under the term "royalties" gives to the Province of Ontario the right and property not only in fines then imposed and uncollected, but in all future fines, and that legislation on the part of the Dominion Parliament attempting without compensation to deprive the Province of Ontario of the right so conferred upon it by sec. 109 is *ultra vires*. Consequently that the fine in question passed to the Crown for Ontario, and under the statute above quoted it is properly allocated and paid into the Consolidated Revenue Fund of the Province of Ontario.

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For the suppliants, the Corporation of the City of Toronto, it is contended not only that the criminal law in its widest sense embraces the creation of fines and the prescribing of the penalty to be imposed, but also that in creating a fine, with its incidents, the Parliament of Canada has the power as part of its criminal jurisdiction, and as one of the incidents of an offence so created, to determine that a fine levied under it shall go to one of the King's subjects instead of to the Crown itself.

To this contention the answer of the Crown in the right of the Province was that the criminal law goes only to the creation of a new offence, and the prescribing of the penalty; in other words conferring on the Court the power to impose a fine for the offence, and that having established the offence and prescribed the penalty which may be imposed, the power of the Dominion Parliament is exhausted, the fine when imposed in pursuance of the statute becomes a royalty, that is a property right belonging to the Crown in right of the Province, and that the Parliament of Canada has no jurisdiction or power to deprive the Province of such royalty in the manner here attempted.

The following are extracts from the British North America Act relating to the question under consideration.

By sec. 91, head (27), exclusive jurisdiction is conferred on the Dominion in respect of "the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

By sec. 92 (13) and (14), exclusive jurisdiction is conferred on the Province in respect of "(13) Property and civil rights in the Province" and (14) the administration of justice in the Province, including the constitution, maintenance, and organisation

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of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

Section 102 provides that:—

"All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public services of Canada in the manner and subject to the charges in this Act provided."

And sec. 109 provides that:—

"All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than of the Province in the same."

That fines generally speaking are royalties is not in controversy. The question is whether the term "royalty" as it appears in sec. 109 is subject to some narrower interpretation excluding fines, and, secondly, assuming that sec. 109 does include fines, whether in 1867, at Confederation, fines, "belonged to" the Crown in right of Upper Canada.

I think the answer to the first question is determined by the Privy Council in their judgment in *Rex v. Attorney-General of British Columbia*, [1924] A.C. 213. Dealing with the interpretation of that section Lord Sumner says (p. 219) that the argument for the Dominion dwells on two points:—

"(1) That the collocation of 'all lands, mines, minerals and royalties' involves that rule of construction, which is called the *ejusdem generis* rule, or, alternatively, that indicated by saying *noscitur â sociis*, so that the word 'royalties' must by construction be limited to royalties of a territorial character; and (2) that all these things thus named must further 'belong to' the Province at the time of the Union as a condition of falling to it under the Act."

Referring to the words "all lands, mines, minerals, and royalties," he says (pp. 219, 220):—

"The truth is, that they constitute a simple enumeration, that the word 'all' applies equally to all four, and that it is in no case

limited, except by the words 'belonging' to the several Provinces, and the words might equally well have been 'all royalties, lands, mines and minerals' or 'all royalties, all lands, all mines and all minerals.' . . . The other argument that the word 'royalties' here means royalties—*jura regalia*—having something to do with lands or minerals, and so *noscitur â sociis*, appears to beg the question."

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At p. 220 he concludes:—

"Their Lordships must take the words of sec. 109 as they stand, and, as they stand, they enumerate certain Crown rights the benefit of which is to be enjoyed by the Provinces, then existing or under appropriate legislation thereafter brought within the ambit of that benefit, as British Columbia has been. By that enumeration their Lordships, like other Courts, are bound."

With reference to the interpretation of the words "belonging to" he says (p. 221):—

"Without expressing any opinion on the question whether the words 'belonging to' mean 'already in fact appropriated,' or only 'such as the Province was entitled to appropriate,' their Lordships think it sufficient to observe that this question, which is substantially one of fact, has not been established in favour of the Dominion in the sense of the argument advanced on its behalf, and that the point must be taken to have failed for the purpose of the present appeal."

That case related to "*bona vacantia*" and was determined in favour of the Province.

In construing sec. 109, I find myself unable to draw any distinction between *bona vacantia* and fines; and, as it has been determined by the Privy Council that *bona vacantia* are royalties within the true interpretation of sec. 109 of the British North America Act, it follows, in my opinion, that fines also are royalties.

The fact that the words of sec. 109 give specifically to the Province all sums then due or payable for royalties implies that the earlier words of the section, "all royalties," refer to something else, namely a right to all royalties thereafter accruing, and the section appears to have been so construed in the British Columbia case.

As I read his judgment, the learned trial Judge in the present case was of opinion that, though fines were royalties, yet a fine like that here in question did not at Confederation "belong to" the Crown in right of the Province of Upper Canada because by the statute it had been granted to others. The statute which was in force in Upper Canada at the time of Confederation was ch. 118

App. Div. of C.S.U.C. 1859, reading as follows (see the judgment of Riddell,
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In my opinion, the statute does not have the effect or produce the result, either directly or indirectly, which is ascribed to it by the learned trial Judge.

“Royalties” (otherwise known as *jura regalia*) is a word of wide signification and content. It includes, among other rights and privileges of the Sovereign, that branch of the prerogatives known as the fiscal prerogatives. These ancient fiscal prerogatives included the right of the Sovereign to revenues of the demesne lands of the Crown, treasure trove, escheats, fines, and several others.

Of these sources of revenue, fines in early times formed a very important part, as appears from the history of the General Eyre as detailed in the lectures of 1921 of Bolland on “The General Eyre” and from the Year Books.

These different classes of *jura regalia* differ widely in their nature and in their special qualities or essential characteristics. The grant of a specific escheat to a subject or the grant to a subject of a franchise for a ferry might well carry by implication, as an incident of the grant, a right of action conferred on the holder of the franchise to sue for the escheated lands or to collect ferry tolls directly and in person; but, as it seems to me, the nature of a fine is such that it is not only highly impracticable but almost impossible without clear and express statutory provision to vest in a subject the right to sue for a fine like that here in question.

In Chitty on Prerogatives of the Crown, p. 260, it is said:—

“On a fine imposed by K.B. for an offence, the amount becomes, by the record of judgment, a debt due to the King *instantly*, and process may either issue out of that Court, or the fine may be estreated into the Exchequer, and proceedings taken therein.”

In *Rex v. Woolf* (1819), 21 R.R. 412, 2 B. & Ald. 609, 613, the defendant had been found guilty of a misdemeanour and sentenced to two years’ imprisonment, to pay a fine of £10,000, and to be further imprisoned till the fine was paid. While the defendant was still in prison undergoing sentence a writ of *levari facias* was issued to recover the fine, and a motion was made to set aside the writ as unwarrantably issued. It was, however, held by the full Court in banc that on pronouncement of sentence and entry of judgment the fine becomes a debt of record for which execution may issue at the suit of the King, and Bayley, J., in the course of his judgment, says:—

“Here there is a judgment that the defendant do pay to the King a fine of a certain sum. By that judgment the debt becomes

a debt to the King, of record; and it is payable to the King *instantly*."

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I agree with the observation of my brother Riddell that this statute (C.S.U.C. 1859, ch. 118) did not divest the Crown of fines such as that in question. In addition, I desire to point out that there is nothing in the statute which expressly or by implication gives to the treasurer of a county or to the chamberlain of a city, or to the Receiver-General of a Province, the right to sue a defendant for the fines imposed upon him. The sentence of the Court and the judgment entered in pursuance of it remains a judgment of record that the defendant *do pay to the Crown* the fine imposed. I conclude therefore that at Confederation in 1867 fines remained royalties belonging to the Crown in right of the Province, even though the beneficial interest in them had been granted by the King, by and with the advice and consent of the Legislative Council and Assembly of Canada, to the municipalities, or to the consolidated fund, and hence that as a royalty the right to a fine passed to the Crown in right of the Province as its property.

It is suggested, however, on behalf of the respondents, that the Dominion Parliament, in the exercise of its exclusive jurisdiction over criminal law in its widest sense, has power to create a new offence with a new penalty attached and as part of such enactment to provide that the fine shall never become a royalty of the Crown, but shall be payable directly to the municipality.

It is unnecessary to determine the question so raised, for conspiracy to defraud is not a new offence nor is a fine a new penalty for that offence. Whether the crime of conspiracy to defraud originated at common law, which appears to be the better opinion (see 1 Hawkins' Pleas of the Crown, 446; 2 Coke's Inst. 561; and the decisions in the United States of *State v. Buchanan* (1921) 5 Harr. & J. (Md.) 317, at p. 336, and *State v. de Witt* (1834), 27 Am.D. 371; 12 Corpus Juris 542, notes 11 and 12), or whether the jurisdiction arose out of the Statute of Edw. I., is immaterial, for it is clear that, at the time when Upper Canada adopted the criminal law of England, conspiracy to defraud had become a part of the criminal law of that country, and so became part of the criminal law of Upper Canada.

Then as to the penalty: conspiracy to defraud was always a misdemeanour; as is said in Archbold's Criminal Pleading, 25th ed., p. 1349, "Conspiracy in an indictable misdemeanour, consisting in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means," and there was always power in the Court to impose a fine in addition to im-

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prisonment for a misdemeanour. It thus appears that both the crime and the penalty existed in Upper Canada in 1867 and subsequently. The only new enactment by the Parliament of Canada was the proviso in question by which the Dominion Parliament assumed to take away the right of property which the British North America Act had accorded to the Crown in right of the Province. It is well settled law that this cannot be done: *Attorney-General for British Columbia v. Attorney-General for Canada*, [1914] A.C. 153, at p. 172; *Montreal City v. Montreal Harbour Commissioners*, [1926] A.C. 299, at pp. 312 and 313.

The conclusions at which I arrive may be summarised as follows: The Crown of the British Empire is one and single—and so is the prerogative of the Crown. They never die. The prerogative has at all times formed part of the law of this Province; whether adopted here with the other laws of England, or inherent in the Sovereignty of the reigning King, is immaterial. Prior to Confederation it coincided with the prerogative as it existed in England, save in so far as it had been varied by the Parliament of Canada with the consent of the Crown.

At Confederation the administration of the prerogative of the Crown in Canada was divided, and, in so far as it appertained to subjects assigned to the Federal authority, passed to the Dominion, and, so far as it appertained to subjects assigned to the Provinces, passed to the Provinces.

Prerogative rights arising out of the criminal law would *primâ facie* on that footing pass to the Dominion and become subject to its legislation, and so I would conclude with respect to the question at issue, were it not for the specific grant to the Crown, in right of the Province, of all royalties.

The term "royalties," as employed in sec. 109 of the British North America Act, includes future fines as well as fines then outstanding and uncollected. This royalty, being thus a right to fines as and when they become payable, is a property-right which the Dominion authority cannot confiscate for the benefit of itself or of another.

The specific ground provided by sec. 109 prevails, in my opinion, over the more general view which I have indicated above—and precludes the Dominion authority in the exercise of its jurisdiction over criminal law from dealing with that particular phase of the prerogative which relates to fines in criminal cases so as to divert them away from the consolidated fund of the Province in favour of municipalities.

These considerations, if well founded, are sufficient to support a judgment that the appeal should be allowed; the proviso of sec.

1036 of the Criminal Code, whereby fines in Ontario are to be paid over to the municipal or local authority, should be declared *ultra vires* of the Parliament of Canada, and the petition of the supplicants should be dismissed with costs here and below.

I should add that I express these views with diffidence both because the appeal raises some questions which are unusual and have not been customarily considered in the Courts of Ontario, and also on account of the high respect which I entertain for the differing conclusion of the trial Judge.

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ORDE, J.A.:—I think there can be little doubt that under the judgments of the Judicial Committee in the *escheats* case of *Attorney-General of Ontario v. Mercer*, 8 App. Cas. 767, and the *bona vacantia* case of *Rex v. Attorney-General of British Columbia*, [1924] A.C. 213, sec. 109 of the British North America Act had the effect of vesting in the respective Provinces, as royalties or *jura regalia*, all future fines imposed for infractions of the criminal law, as the criminal law of Canada then stood, that is on the 1st July, 1867.

I emphasise the words “as the criminal law of Canada then stood” because, in my judgment, the exclusive authority given by sec. 91 of the British North America Act to the Parliament of Canada to legislate upon “all matters coming within” the subject of “The Criminal Law, except the Constitution of Courts of Criminal jurisdiction, but including the Procedure in Criminal matters,” gave Parliament the power, if it should see fit to exercise it, of so dealing with fines for criminal offences as to remove them from the category of royalties belonging to the Provinces. And, in so far as the fine here in question is concerned, I think that Parliament has effectively exercised that power.

Once the term “royalties” is dissociated from the words “lands, mines, and minerals” in sec. 109, and is therefore not to be confined to royalties merely arising out of or incidental to or otherwise of the same nature as lands or mines or minerals (and it must be so dissociated under the two decisions already mentioned), the word has obviously a much more extended meaning. It extends to and includes the prerogative right of the Crown, in certain events, to the ownership of property which may previously not have existed. Royalties of that type differed essentially from the title then given to lands, mines, and minerals which were then in existence and could be ascertained and defined.

Such royalties constitute merely enforceable rights, necessarily dependent upon the happening of some event, to become effective. Just as a right to collect tolls for passage along a highway or over

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a bridge would depend upon the arrival of a traveller demanding passage, so the right to the escheat in the *Mercer* case depended upon the death without heirs of the owners of the lands, and the right to the *bona vacantia* in the *British Columbia* case depended upon the dissolution and winding-up of the company which had previously owned them. The prerogative right to receive all fines imposed for criminal offences would necessarily depend upon many things for its enforcement. There must at the outset be some law authorising the imposition of a fine as a punishment for some crime. There must be a conviction, and in most cases the exercise of some judicial power imposing the fine.

Where does the legislative power to impose fines by way of punishment for criminal offences rest? It must be in the Dominion Parliament. No one in his senses would suggest that under the British North America Act a provincial legislature could exact a fine for breach of the Criminal Code as such. In whom is vested the power to alter or vary the existing law as to fines for criminal offences? Under no theory can that power be elsewhere than in the Parliament of Canada.

If the legislative power to impose a fine by way of punishment for a crime, and to fix the amount thereof, and to alter or vary the amount or to abolish the fine as a form of punishment, is vested in the Dominion Parliament as part of its jurisdiction over criminal law, it would clearly be within that jurisdiction, under sec. 91, to say where any such fine should go, whether to the Government of Canada, or to the Government of the Province, or to a municipality, or to some charity, or to a common informer, or to the person aggrieved.

In *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524, the Judicial Committee, at p. 529, stated that under para. 27 of sec. 91 it was "the criminal law in its widest sense" that was reserved to the Dominion Parliament. This statement cannot, of course, carry the realm of jurisdiction beyond its legitimate limits, so as to justify a legislative invasion into the field of provincial jurisdiction by enacting ancillary provisions under the professed authority of para. 27: *In re Board of Commerce Act*, [1922] 1 A.C. 191, at p. 199.

But, if we had to deal with the legislative authority of the Parliament of Canada under sec. 91, without reference to any other part of the British North America Act, would there be any question as to its jurisdiction to deal with fines for criminal offences in any way it might see fit?

Has sec. 109 deprived Parliament of that power or can it hamper its exercise of it? Not only is the legislative authority of

Parliament over all matters coming within the 29 classes of subjects which are enumerated in sec. 91 exclusive, but the authority may be exercised "notwithstanding anything in this Act."

While it might well be that the statutory vesting of all future "royalties" in the Provinces by virtue of sec. 109 would entitle the Provinces to all such fines as might thereafter be imposed under the criminal law as it then stood, the right or *jus regale* thereto was necessarily dependent upon that particular species of royalty remaining of the same character, and was, I think, necessarily subject to the exercise of any legislative power over the subject-matter to which the right or royalty might attach.

To hold that the legislative authority of Parliament over the criminal law in its widest sense includes the power to dispose of fines and to dispose of them in such a way as to deprive the Province of what, but for the exercise of such legislative authority, would be the right to collect and receive such fines, does no real violence to sec. 109. The royalties thereby vested in the Provinces included many other species of right than that of receiving fines. The escheat and *bona vacantia* cases are examples of such other rights. And, as pointed out by Lord Sumner in the *bona vacantia* case, at p. 221, there are many other *jura regalia* than those we have been discussing in this case.

Though counsel for the Province may not have put their argument quite in these words, it virtually amounted to this: that, notwithstanding that Parliament may have power to abolish all or any fines as penalties for criminal offences, yet so long as the law provides for the imposition of fines for criminal offences those fines belong of right to the Provinces. Parliament can do nothing to affect their destination otherwise. But, even if this contention is not applicable to fines imposed by legislation subsequent to Confederation (over the disposal of which Mr. Bayly admitted Parliament may have complete jurisdiction), it must apply to fines for common law crimes such as conspiracy under the law as it existed at Confederation.

The legislative authority of Parliament over the classes of subjects enumerated in sec. 91 is, of course, paramount, and legislation upon those subjects may not only validly affect provincial rights of property, as in the Fisheries case, *Attorney-General for Canada v. Attorneys-General for Ontario Quebec and Nova Scotia*, [1898] A.C. 700, at pp. 712, 713, but may go the length of expropriating or destroying property rights theretofore vested in the Provinces: *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1906] A.C. 204; though there may be some

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limitations upon such power, as was exemplified in *Montreal City v. Montreal Harbour Commissioners*, [1926] A.C. 299.

It is unnecessary to consider whether or not an Act of Parliament, passed under its authority over criminal law, which might have the effect of taking away from a Province some concrete piece of property actually vested in it (if such legislation were possible) could be valid. We are not dealing here with property of that character at all. I am clearly of the opinion that when the so-called property consists of something not of a concrete nature, but of a mere right, which, in so far as it may ever bear fruit, is wholly adventitious in character, being dependent, where the right to collect fines is concerned, wholly upon the criminal law as a foundation for the imposition of the fines, then the power of Parliament to legislate upon criminal law is paramount, even if its effect is to destroy any property-rights of the Province in the fines as *jura regalia*. How attenuated the nature of the right to collect a fine is, becomes more apparent when it is remembered that after its judicial imposition the fine may be remitted by the Governor-General in Council in the exercise of executive clemency.

It really tends to obscure the point to regard the right or *jus regale* to collect a fine as a right of property at all. The so-called property-right is really conditional or adventitious. The thing to which the right entitles the Province to lay claim depends in this case upon the criminal law for its very existence. If the criminal law so defines the thing as to take it out of the ambit of the right, then the thing itself never becomes subject to the provincial claim.

I cannot believe that the British North America Act ever intended that the comprehensive and exclusive power to legislate over the criminal law should be hampered by the mere fact that fines for criminal offences, as the law then stood, were included among the royalties vested in the Provinces at Confederation.

I have found myself quite unable to follow the argument that there is any distinction in this regard between fines for common law offences and fines for offences declared such by statute. The whole field of criminal law is within the domain of Parliament, and the fact that it has left untouched certain common law crimes, such as conspiracy, does not affect its power to legislate as to the punishment for such offences, whether it be by way of fine or otherwise.

The power to impose a fine upon a conviction for conspiracy may exist at common law, but sec. 1035 of the Criminal Code, in authorising the imposition of a fine for any indictable offence, is wide enough to include common law indictable crimes.

The Parliament of Canada having complete power to declare, as part of the criminal law of Canada, how fines shall be paid, and to whom, the sole question remaining to be determined is whether or not Parliament has so legislated as to deprive the Province of Ontario of what might otherwise be its right to receive the fine in the present case.

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Section 1036 of the Code is not limited in its operation to fines for offences defined by the Criminal Code itself, but deals with "any fine, penalty or forfeiture imposed for the violation of *any law*," and extends therefore to all fines imposed for any crime, whether such crime be declared such by the Criminal Code or by any other statute, or is still existing and punishable as a common law crime. That section is, in my judgment, wholly within the legislative authority of Parliament, and the proviso that "with respect to the Province of Ontario the fines, penalties and forfeitures and proceeds of estreated recognizances first mentioned in this section" (i.e. for the violation of any law) "shall be paid over to the municipal or local authority," etc., is valid and effective.

It is not without interest to note, as examples of the range of Parliamentary legislation as to punishment for crimes, some of the instances in the Criminal Code of what might be regarded, but for Parliament's overriding powers when legislating upon the special subjects mentioned in sec. 91, as intrusions into the domain of "Property and Civil Rights." Goods may be forfeited, such as, for example, gambling implements (sec. 641); liquor near his Majesty's vessels (sec. 639); instruments and materials used in counterfeiting money (sec. 569); and dangerous weapons (sec. 622). The Court may order the restitution of stolen property to the owner (sec. 1050), and may order compensation to be paid to persons whose property has been stolen or injured (sec. 1048), or who have in good faith purchased stolen property (sec. 1049). All these are probably justifiable as forms of punishment and so part of the criminal law.

There can be nothing anomalous or unusual in Parliament's assuming complete power to say to whom fines imposed as punishment for crimes shall be paid. And, in my judgment, Parliament's exclusive and overriding power to legislate upon the criminal law in its widest sense is not to be hampered by the fact that among the things vested in the Provinces at Confederation by sec. 109 was a mere right, dependent for its enforcement upon events of an adventitious character, and conditional for the very existence and creation of the subject-matter or thing over which the right might be asserted, upon the will of a legislative body exercised in

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For these reasons I think the appeal should be dismissed.

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FISHER, J.A., agreed with MASTEN, J.A.

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Appeal allowed (LATCHFORD, C.J., and ORDE, J.A., dissenting.)

[APPELLATE DIVISION.]

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LIPPERT V. FORD HOTEL OF TORONTO LTD.

March 28. *Innkeeper — Contract to Receive Guest at Fixed Rate — Breach —
Ejection of Guest from Inn — Damages — Findings of Jury —
Costs.*

The plaintiff, the manager of an incorporated company in K., wrote from that city to the defendants, the keepers of a hotel in T., asking if they could reserve a room for him in their hotel from the 22nd August until the end of an exhibition held in T., and what the rates were. The defendants answered that they would be pleased to reserve a room for the plaintiff at \$1.50 a day; and the plaintiff's company, on behalf of the plaintiff, replied accepting the offer. A room was reserved for the plaintiff, but he did not present himself at the hotel on the 22nd August until about 11 o'clock p.m., when "all reservations were cancelled," as the night-manager of the hotel said. The defendants, however, gave the plaintiff a room, not a \$1.50 room, but a \$2 one, saying that they would give him a \$1.50 room the next day, and the plaintiff stating his claim to a room at \$1.50. The plaintiff remained in the room for 9 days. At the end of a week he received an account for the room at \$2 per day. He at once protested; and, after discussions with the night-manager and manager, said that he would pay only \$1.50 a day. The manager told him that, if he was going to talk like that, he would pay at once or get out, and if he did not get out he (the manager) could have him arrested by a policeman. The plaintiff tendered payment at the rate of \$1.50 a day, which was refused. Going to his room, he found it locked against him. He went to the manager again, his solicitor with him, when the manager said he would accept the \$1.50 a day. The manager used insulting language and the plaintiff retaliated. Asked how long he intended to stay, and saying "till the end of the exhibition," he was told by the manager that he would not accept the \$1.50 a day if that was the case, and that he (the plaintiff) would have to get out and stay out. He left without being allowed to take his luggage, and tried to get accommodation elsewhere, but failed, and so went home to K. Coming back to T., he got a room at \$2.50 at another place. In this action he sought damages: (1) for breach of contract; (2) for wrongful ejection; (3) for wrongful detention of luggage; (4) for slander. The trial Judge dismissed the claim for slander; but left the other claims to the jury, who made findings in favour of the plaintiff:—

Upon appeal by both parties:—

Held, that, as it appeared that the plaintiff could recover only nominal damages upon the claim for slander, - a new trial should not be granted.

- (2) That a contract was made by the plaintiff's company as his agent, and the plaintiff was thus entitled to sue in contract.
- (3) That it was the contract duty of the defendants to furnish the plaintiff with a room at a charge of no more than \$1.50 a day—if they had no room at that price, another just as good should have been furnished at that price.
- (4) That the contract was broken by the debarring of the plaintiff from his room without giving him another room, and by ordering him out of the house.
- (5) That the plaintiff, who was in charge of his company's exhibit at the exhibition, was not entitled to damages for time lost from his exhibit when he returned to K.; that was the loss of his company; and a joint stock company and a shareholder, even of practically all the shares, are in law distinct entities: *Salomon v. Salomon & Co.*, [1897] A.C. 22.
- (6) That the plaintiff was entitled to recover as damages the amount of his expenses going to K. and back, and money paid for extra lodging.
- (7) The fact that the plaintiff was received under a special contract did not deprive him of his ordinary rights as a guest—but his claim in that capacity to damages, beyond his money loss, for his exclusion, was denied by the jury, and their finding accepted by the Court.
- Per* MASTEN and ORDE, J.J.A.:—The plaintiff was not entitled to damages for his expulsion—he was suing in contract, not in tort, and he could not recover in both. *Whiting v. Mills* (1849), 7 U.C.R. 450, distinguished.
- (8) The sum due to the defendants for lodging the plaintiff for 9 days at \$1.50, viz., \$13.50, should be deducted from the plaintiff's damages.
- In the result the appeal was allowed in part without costs to either party, and judgment was directed to be entered for the plaintiff for \$12.50 and Division Court costs without a set-off.

APPEAL by the defendants and cross-appeal by the plaintiff from the judgment of the County Court of the County of York (O'CONNELL, Co.C.J.), in an action tried with a jury, awarding the plaintiff damages for the wrongful refusal of the defendants to allow him to continue to occupy a room in their hotel and for expulsion therefrom, etc. The cross-appeal was as to a claim of the plaintiff for damages for slander. This was withdrawn from the jury and dismissed by the trial Judge.

February 26. The appeal and cross-appeal were heard by RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

G. B. Balfour, K.C., for the defendants. The learned trial Judge erred in his charge to the jury on the interpretation of the contract of the defendants. The undertaking to "reserve" a room imposed upon the defendants the duty only of keeping a room for a future occasion; and, unless the plaintiff appeared to claim the room at a reasonable time on the day for which he had reserved it, the defendants were entitled to let the room reserved to another guest. There was no duty cast upon the defendants to hold the

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room indefinitely. In any event the damages (\$276) assessed by the jury were excessive.

W. D. M. Shorey, for the plaintiff. The refusal to keep the plaintiff as a guest gives him a right of action for tort: Roscoe's Evidence in Civil Actions, 19th ed., p. 541; *Whiting v. Mills* (1849), 7 U.C.R. 450. Since the common law right to lodging in an inn remains, the plaintiff is entitled to exemplary damages: *Hancock v. Rand* (1883), 94 N.Y. 1; *Pratt v. British Medical Association*, [1919] 1 K.B. 244; *Bell v. Midland Railway Co.* (1861), 10 C.B.N.S. 287; *Mackay v. Canada Steamship Lines Ltd.* (1926), 29 O.W.N. 334. The meaning of the learned trial Judge's charge, taken as a whole, is perfectly clear, and with that meaning the charge is correct. The amount of damages found by the jury is not so large that it ought to be disturbed. On the claim for slander based on the words, "I'll call a policeman and have you arrested," the plaintiff is entitled to nominal damages, on the ground that by-standers overhearing those words might think him to have been guilty of a criminal offence.

Balfour, K.C., in reply. The defendants were entitled to eject the plaintiff as a guest because of his undesirable conduct. This is to be distinguished from refusing lodging in the first instance. The words complained of are not capable of the interpretation contended for.

March 28. RIDDELL, J.A.:—This is an action the like of which has not been reported in our Courts for nearly a century; and no similar action is likely to be brought for another century.

In view of the course the case took at the trial and before us, it will be well to set out the causes of action alleged in the statement of claim; no amendment being asked for, we should not consider anything beyond what is formally claimed.

The statement of claim states that the defendants, being hotel-keepers, agreed to lodge the plaintiff at the rate of \$1.50 a day during the continuance of the Canadian National Exhibition; that they received and lodged him from the 22nd August till the 31st August, 1929, when they ordered him to leave; that they wrongfully detained his baggage, and that "in consequence of the said refusal "(i.e., to lodge him longer) "and the detention of the . . . baggage," he was put to expense and inconvenience. Moreover, it is alleged that the plaintiff, in consequence of the public humiliation with which the defendants treated him, "suffered great mental distress." Then a charge of slander is made and the "plaintiff claims . . . damages for the said injuries, the return of his . . . baggage," costs and general relief.

It will be seen that the claim is fourfold: (1) breach of contract to lodge the plaintiff for the period of the exhibition at the rate of \$1.50 per day, entitling him to damages for breach of contract; (2) wrongful ejection from the hotel from which he suffered humiliation and consequently damages; (3) wrongful detention of baggage; and (4) defamation.

The facts as disclosed in the evidence are simple enough, but none the less startling to those of us who are accustomed to lodge temporarily at hotels and experience the courtesy and consideration there exhibited.

The plaintiff, being manager of a joint stock company in Kitchener, desired to look after the interests of his company at the Canadian National Exhibition last year; he accordingly wrote the defendants, a hotel company, having a hotel in Toronto: "Kindly advise if you could reserve a room without bath for Mr. Geo. J. Lippert, from August 22nd until the end of the Canadian National Exhibition, and also what the rates are." The defendants replied: ". . . . we shall be pleased to reserve one single room with running water at \$1.50 per day for Mr. G. J. Lippert, if you will kindly advise us immediately if this meets your approval . . ." Obviously this was not a contract but only an offer of a contract, in no way binding upon the defendants until accepted. An acceptance came in due course: "In reply to yours *re* reservation of one single room for Mr. G. J. Lippert, he desires this room from August 22nd until the end of the exhibition." This was recognised by the defendants as an acceptance of their offer, and a room was reserved for the plaintiff; but he did not turn up on the 22nd August, the first day of his reservation, until about 11 o'clock at night, and, as the night-manager says: "At that time all reservations were cancelled."

In other words, the hotel company chose to consider that their agreement to have a room for the plaintiff was one they could terminate if he should not come and claim it at an earlier hour than he did. That they could have made that a term of their undertaking there can be no doubt, but they did not do so, and it is clear that by omitting to have the room for the plaintiff when he did come—at least if he came before the end of the 22nd—they broke the contract which they had entered into. Whether they had the right to look upon the contract as abandoned if he did not appear before the end of the day I do not consider, simply saying that I have no intention to give colour to such a proposition.

On the plaintiff presenting himself as a guest, it was his right to have a room for the prescribed period at the rate of \$1.50 per day, with the conveniences mentioned in their letter, or, at least,

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their equivalent. When he did present himself at about 11 o'clock on the 22nd, he entered his name in the register in the ordinary way, told the night-manager that he had a reservation, and was handed a card upon which he signed his name. Then the hotel employee took back the card and marked "\$2 a day" on it. The plaintiff told him that the letter of reservation stated the rate at \$1.50 a day, and the hotel employee said that he could not give him a dollar and-a-half room, they were all gone, but would give him one the next day. Then the plaintiff stated that the rate was to be \$1.50 a day and that he never expected there would be any dispute about it.

There can be no doubt as to the contract duty of the hotel company to furnish the plaintiff with a room, charging not more than \$1.50 per day, no matter what was the state of the \$1.50-a-day rooms as to occupation; if they had no rooms at \$1.50 a day, another just as good should have been furnished at \$1.50.

The plaintiff went to a room allotted to him (what is called a \$2-a-day room); he remained there 9 days in all. At the end of a week he received an account for the room at \$2 per day, and drew the attention of the cashier to the fact that he had been quoted \$1.50 per day. Of course she could do nothing, and he asked her to refer the matter to the manager, which, apparently, she did. At all events, on receiving a new bill for the \$14 (and some trifling charges for telephoning) he saw the manager, after an unsatisfactory interview with the night-manager who had received him at first. Staying away from the Exhibition for the purpose, he saw the manager, who insisted that, as he had been in a \$2-a-day room, he should pay at that rate. The plaintiff saying that he would pay only \$1.50 a day, the manager told him that, if he was going to talk like that, he would pay at once or get out, and if he did not get out he would have him arrested; that he would get a policeman and have him arrested. Then the plaintiff sent for his solicitor, and himself tendered payment to the cashier at the rate of \$1.50 a day; it was refused. Going to his room, he found it locked against him; going to the manager again, this time with his solicitor, another jangle took place, and at length the manager said he would accept the \$1.50 a day. The manager used insulting language to him, and the plaintiff retaliated in kind. Asked how long he intended to stay, and replying "till the end of the Exhibition," he was told by the manager that he would not accept the \$1.50 a day if that was the case and that he (the plaintiff) would have to get out and stay out. He left without being allowed to take his baggage, and tried to get accommodation elsewhere, but failed, and so went home to Kitchener. Coming back again to Toronto, he was

accommodated with a room at \$2.50 a day at another place. I have given the story as detailed by the plaintiff, as the jury seem to have accepted his account, and I see no reason to doubt its substantial accuracy.

At the trial before his Honour Judge O'Connell and a jury, the learned Judge dismissed the action for slander, but on the other parts of the proceedings he left the case to the jury in the form of questions submitted to them. The following are the questions and answers:—

"1. In what amount is the plaintiff indebted to the defendant for hotel accommodation, if any? A. \$13.50.

"2. Did the defendant wrongfully refuse to accept the plaintiff as a guest at the hotel? A. Yes.

"3. If so, at what amount do you assess the damages therefor? A. \$226.

"4. Did the defendant wrongfully detain the personal property of the plaintiff? A. Yes.

"5. If so, at what amount do you assess the damages therefor? A. \$5.

"6. What value do you place on the plaintiff's personal property detained by the defendants? A. \$45."

The jury, being asked to particularise the award of \$226, did so as follows:—

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| Expenses going to and back from Kitchener..... | \$ 20 |
| Time lost from exhibit | 200 |
| Extra board paid | 6 |

Then counsel agreed that the amount owing the defendants should be deducted from the verdict, and judgment was entered for the plaintiff for \$217.50, as well as for the delivery of his goods or \$45 in lieu thereof.

The defendants appeal generally, and the plaintiff cross-appeals against the dismissal of his claim for slander. This we disposed of at the hearing—it appearing that the plaintiff could recover only nominal damages, we, following the well-established practice, refused to grant a new trial, the result of which could be no more than nominal damages.

The other branches of the case require more extensive examination. The damages awarded for time lost from the Exhibition cannot be allowed this plaintiff as such; the loss, if any, was the loss of his company; and since *Salomon v. Salomon & Co.*, [1897] A.C. 22 (Dom. Proc.), there never has been any doubt that a joint stock company and shareholder, even of practically all the shares, are separate and distinct entities in law. As the company is not a party to this litigation, and no application has been made to add

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it as a party, we need not consider whether the company has a cause of action—that will depend upon the construction to be placed upon the contract. Whether the plaintiff can recover on contract at all depends upon whether the contract was made by the defendants with him or with his company. It might be that the Kitchener company, being desirous to send its representative to Toronto, secured accommodation for him for its own purposes, and made the contract with the defendants for itself, in its own name. Were this the case, there was no contract with the plaintiff at all, and he could have no advantage from the contract actually entered into. The law in England is fully discussed in an article in 46 L.Q.R. 12, and in Ontario in *Kendrick v. Barkey* (1907), 9 O.W.R. 356; but this is trite and familiar law. Here the contract seems to have been made by the Kitchener company, not as employers of the plaintiff but as his agent—and it was thus that all parties looked upon it. Consequently the plaintiff may sue in contract.

Assuming then, as I do, that there was a contract with the plaintiff—and all parties have treated the reservation as made by him—the plaintiff was entitled to accommodation for the term of the exhibition at \$1.50 a day, and the defendants are liable for the breach of this contract. This contract was broken by the debarring of the plaintiff from his room without giving him another room, and further by ordering him out of the house.

I see no reason why the plaintiff should not receive the sum of \$20 for expenses going to Kitchener, an expense which was rendered necessary by the conduct of the defendants. It may indeed be that he will be or has been reimbursed by his company, but he had to make the expenditure at the time, and I can see no reason why he should not be allowed it. As to the \$6 item there can be no doubt, for the same reason. The finding as to the baggage is also to be sustained—the retention was wholly unjustified.

But the fact that the plaintiff was received under a special contract does not deprive him of his ordinary rights as a guest; and it is in that capacity that he claims damages beyond his money loss.

From the findings of the jury, we are relieved from deciding whether he is entitled to be awarded such damages by the jury. If and when that question arises, it may be necessary to consider such cases as *Whiting v. Mills*, 7 U.C.R. 450, especially at p. 453, *per* Robinson, C.J., and *MacGowan v. Duff* (1887), 14 Daly (N.Y.) 315.

But, upon the matter being laid before the jury, they seem to have come to the conclusion that the plaintiff here was not entitled to any damages on that head—probably thinking that “he gave as

good as he got." If that was their conclusion, I am inclined to agree with them— at all events, it cannot be said that such a conclusion was unwarranted; and the result is that we must accept the finding that the plaintiff suffered no damage from the exclusion from the hotel in the manner that this was effected.

The plaintiff, then, is entitled to:—

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| The sum of | \$20.00 |
| The sum of | 6.00 |

\$26.00

| | |
|-----------------------|-------|
| Less the sum of | 13.50 |
|-----------------------|-------|

Namely: \$12.50

In view of the utterly unwarranted and insolent conduct of the manager toward his guest, I would give the plaintiff County Court costs of the action; but, success being divided, no costs of the appeal to either party. As I have said, we do not interfere with any action the Kitchener company may be advised to take for the loss it suffered from the action of the manager.

MASTEN, J.A.:—This is an action where the *fons et origo mali* involves a sum of \$4.50, the controversy relating to a difference of 50 cents per day in the price of a room in the defendants' hotel which the plaintiff occupied for 9 days. Speaking with the extreme of judicial reserve, I would say that in this controversy each party failed to exercise diplomatic or even fair and reasonable consideration for the rights of the other, and each somewhat autocratically overestimated his own rights and insisted on them according to his own estimate. But whether on the facts one sympathises with the conduct of the plaintiff or with that of the defendants or disapproves of both, the law remains the same, as also its application to the facts of this case.

The action as launched embraces three distinct and definite claims: (1) Slander; (2) breach of contract to lodge the plaintiff; (3) wrongful detainer of the plaintiff's goods.

No other cause of action was embraced in the statement of claim or put forward at the trial.

The trial Judge entered a nonsuit on the claim for slander, and I agree that a new trial of that branch ought not be granted by this Court.

With respect to the other claims, the following were the questions submitted to the jury, and their answers: (as set out in the judgment of RIDDELL, J.A., *supra*).

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I note a minor inadvertence in question 2, which ought, having regard to the statement of claim and the whole course of the trial, to have read: "Did the defendant wrongfully refuse to retain the plaintiff as a guest?" The action was launched and has proceeded as an action for breach of contract to lodge the plaintiff from the 22nd August till the conclusion of the Toronto Exposition. It is not an action of tort for wrongful refusal to receive the plaintiff as a guest. He was in fact received and was wrongfully dismissed and excluded in breach of the contract to keep him till the exhibition ended. The point is of importance on a question to which I advert hereafter.

I observe, in the next place, that the plaintiff has not up to the present time paid or effectively tendered to the defendants the sum of \$13.50 for which he is admittedly liable. While it is quite true that on the 22nd August he tendered to a clerk of the defendant company three \$5 bills in payment of \$10.50 for a week's lodging which he had enjoyed in a \$2-a-day room, the clerk had no authority to receive or accept such a tender, and no tender in respect of the last two days' occupation, or any further or other tender, was ever made. On the 30th August, after his final quarrel with the manager, Tremble, the plaintiff ought to have made a formal tender of \$13.50 and demanded his baggage. He did neither, and the defendants were entitled to retain his baggage till it had been paid. The item of \$5 allowed by the jury as damages for detaining the plaintiff's baggage should be disallowed.

For reasons fully stated by my brother Riddell, and to which I cannot usefully add anything, the item of \$200 damages found by the jury "for time lost from the exhibit" must be disallowed.

For breach by the defendants of their contract to lodge the plaintiff, he is entitled to the damages which naturally flow from that breach. These embrace the \$6 additional cost of lodgings paid by the plaintiff for 6 days, and the \$20 which the jury allowed him on the ground that he could not get other lodgings in Toronto, and was compelled to go home to Kitchener over Sunday. I strongly suspect that he would in any case have gone there for the week-end, but the jury have passed on the item on conflicting evidence, and their finding cannot be reversed.

This brings me to the consideration of the most important point in the appeal, namely, the contention of the plaintiff that he is entitled to damages for being rudely and abruptly turned out of the hotel without good reason.

On the argument, the case of *Whiting v. Mills*, 7 U.C.R. 450, was referred to and relied on. That was a special action on the case—or, in present-day parlance, an action of tort.

The first count in the plaintiff's declaration charged "that the defendant was an innkeeper and kept a common inn at Kingston for the reception and accommodation of travellers; that on the 24th February, 1848, the plaintiff, being a traveller, came with certain goods and chattels, etc., and was then accepted and received by the defendant into the said inn with the said goods as a guest, and that the plaintiff afterwards, to wit, on the 1st April, in the year aforesaid, paid to the defendant a large sum of money, viz. £10, being for board in the same inn for the space of 6 weeks ending on the 3rd day of April aforesaid. Yet that defendant, not regarding his duty, as such innkeeper, but contriving to injure the plaintiff, and to put her to great and unnecessary trouble, and expense and inconvenience, and to injure her health and feelings, afterwards and upon the said 3rd day of April, did not nor would suffer or permit the plaintiff longer to continue or lodge at the said inn, as aforesaid, with the said goods, during the said time in that behalf, but wholly neglected and refused so to do; and on the contrary thereof, on the night of the said 1st day of April, in the year aforesaid, then wrongfully and unjustly turned the plaintiff, with the said goods, out of his said inn, whereby the plaintiff was forced to quit the said inn, and to go and travel in the night time of the said 1st April, to the distance of 10 miles, in order to procure lodging elsewhere, and a place of safety for her goods."

To this count the defendant pleaded:—

"That the plaintiff did not as such traveller as aforesaid pay to the defendant the said sum of money in the said first count mentioned, or any part thereof, as in the said first count alleged: and of this he puts himself upon the country."

The jury found for the plaintiff on the first count, and 25 shillings damages, but upon the above plea to that count they found for the defendant, and the action was in consequence dismissed.

On the appeal a question appears to have arisen as to whether the relationship of the parties was that of guest and innkeeper or not, and in the course of his judgment, Robinson, C.J., says, at p. 452:—

"She had been there about 6 weeks. If she had rented a certain apartment as tenant for any certain term, she would have been no longer a guest; but what is shewn is that she came to the inn as a guest; that she was so received; *staid* there six weeks, and had paid for her board by the week two days in advance."

The conclusion of the Court was that she was a guest and as such "had her rights as a guest, and could not be rudely or abruptly turned out without some cause to justify it."

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Discussing the plaintiff's motion for judgment *non obstante veredicto* upon the third issue, the Chief Justice says, at p. 453:—

"We think we must look upon the 3rd plea as admitting what is not directly traversed in it—namely, that the plaintiff was in the defendant's inn as a guest, and as being intended to deny only the allegation of payment of her fare, which was a fact necessary to be proved in order to sustain the plaintiff's case, and a fact expressly averred in the declaration. The plaintiff rested her case, not on any allegation of tender, but on an averment of actual payment . . . The 3rd plea traversed the payment, . . . So we think that the said plea traversed a material fact, and it has been found for defendant . . . The rule therefore for judgment *non obstante* is discharged."

I observe that the action was in tort, not contract—that it was dismissed because the jury found that the hotel-bill had not been paid as alleged; and that the observations as to the rights of the plaintiff as a guest were obiter.

I am unable to apprehend that this decision has a bearing on the rights of the plaintiff in an action of contract such as this.

I agree with the opinion expressed by my brother Orde in the case of *Toronto Hockey Club v. Arena Gardens of Toronto Ltd.* (1924), 55 O.L.R. 509, at p. 518, where he says:—

"There is no foundation for any theory that a plaintiff can recover both in tort and for breach of contract when the tort and the breach of contract result from the same act. In every such case the plaintiff must either elect or be deemed to have elected: the recovery of one judgment in respect of two distinct and technically incompatible causes of action is impossible."

The statement is fully supported by the authorities there cited, including the decision of the House of Lords in *Addis v. Gramophone Co. Ltd.*, [1909] A.C. 488.

The plaintiff in launching this action elected to sue for breach of contract. He succeeds and is entitled to recover the damages which in the contemplation of the parties would naturally flow from the breach of that contract. These damages are the \$6 extra paid for lodgings and the \$20 expenses in going over Sunday to Kitchener.

Against this is to be set off the sum of \$13.50 due by the plaintiff to the defendants for 9 days' use of the room.

The judgment below should be varied by reducing the sum payable by the defendants to the plaintiff to \$12.50, and by directing that instead of County Court costs the plaintiff recover Division Court costs without a set-off.

Success on the present appeal is divided, and I would award no costs of this appeal to either party.

ORDE, J.A., agreed with MASTEN, J.A.

FISHER, J.A., agreed with RIDDELL, J.A.

RIDDELL, J.A.:—The result is that the Court is agreed upon reducing the judgment to \$12.50, and that there should be no costs of the appeal; as to the other costs, all the members agree that the plaintiff should have costs of the action, but two would allow only Division Court costs without a set-off, not acceding to the view of the rest of the Court that more should be allowed—more, then, cannot be awarded. The appeal, therefore, is allowed in part; and judgment directed to be entered for the plaintiff for \$12.50 and Division Court costs without a set-off, no order being made as to the costs of the appeal.

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Appeal allowed in part.

[IN CHAMBERS.]

RE TORONTO FINANCE CORPORATION.

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April 9.

Company—Winding-up—Petitions for Order—Companies Act, R.S.O. 1927, ch. 218, sec. 214(c) — “Just and Equitable” — Whether Substratum of Company Gone—Deadlock in Management—Lack of Confidence—Undertaking to Surrender Charter—Discretion—Absence of Fraud and of ultra Vires Transactions.

Upon the petition of two directors of the company and the petition of eleven shareholders for orders for its winding-up under sec. 214 (c) of the Ontario Companies Act:—

Held, that the evidence did not establish that the substratum of the company, or even a substantial part of it, had disappeared.

The mere fact that there had been depreciation in the value of its assets, or that the assets had become frozen instead of liquid, did not establish the disappearance of the substratum.

Where the company is formed for several purposes, it may abandon one of them and carry on the others—if it does so, it cannot be said that the substratum has gone.

The principal business carried on by the company was dealing in secured mortgages on real estate; the company had all its assets, but they were depleted in value, and at the time the petitions were presented the market was unfavourable to realisation; the company should be allowed to proceed with the realisation, which would be seriously prejudiced by a winding-up order.

Re Hamilton Ideal Manufacturing Co. Ltd. (1915), 34 O.L.R. 66, distinguished.

2. At the time of the presentation of the petitions there were only four directors, whereas the company under its by-laws should have

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five. The two petitioning directors had recently refused to attend meetings or to discuss with the other directors the management of the company's affairs:—

Held, that, if any deadlock existed, it was created by the two petitioners, and was not a ground for ordering a winding-up.

Re James Lumbers Co. Ltd. (1925), 58 O.L.R. 101, followed.

3. A lack of confidence on the part of the shareholders in the management of the company's affairs as a ground for making a winding-up order must be a *justifiable* lack of confidence grounded on conduct of the directors in regard to the company's business—and that was not shewn.

Unless there is fraud in connection with the management, or the transactions are beyond the powers of the company, a majority of the directorate must govern, and the only redress open to minority shareholders is to vote out the directors who offend.

The Lumbers case, supra, and *Re Jury Gold Mine Development Co. Ltd.* (1928), 63 O.L.R. 109, followed.

4. An undertaking given by the company to the Registrar of Companies to surrender its charter within 6 months of the date of the incorporation of a proposed new company of the same name is not a ground for a winding-up order.

It was not, therefore, upon any of the grounds taken, "just and equitable" that the company should be wound up.

Two petitions for orders for the winding-up of the Toronto Finance Corporation, one of them being by two of the directors, and the other by eleven of the shareholders.

The petitions were heard together by WRIGHT, J., in Chambers. *S. A. Hayden*, for the petitioners.

R. H. Greer, K.C., and *M. P. Hyndman*, for the company.

April 9. WRIGHT, J.:—For convenience these petitions were heard together, as the material filed was applicable to both petitions.

The company was incorporated on the 3rd February, 1921, with an authorised capital of \$2,000,000.

The charter or letters patent of the company conferred upon it very wide powers, but until recently the principal business carried on by the company was dealing in second mortgages on real estate in the city of Toronto.

The company does not appear to have enjoyed, at any time during its history, a peaceful career, and certainly for the last few months it has had a very strenuous existence. It is sought by these petitioners to end the controversies by having the company wound up under sec. 214 of the Ontario Companies Act, having particular reference to clause (c) of that section, which provides that where, in the opinion of the Court, it is just and equitable for some other reason than the bankruptcy or insolvency of the corporation that it should be wound up, a company may be wound up by order of the Supreme Court.

The petitions are based on four distinct grounds, which may be classified as follows:—

1. That the substratum of the company is gone.
2. That there is a deadlock in the management of the company which prevents it being successfully carried on.
3. That there is a lack of confidence on the part of the shareholders in the management of the company.
4. That an undertaking has been given by the company to the Registrar of Companies to surrender its charter within 6 months of the date of the incorporation of the new company of the same name.

I think it is desirable to deal first with the fourth ground. The undertaking referred to was given because it was thought advisable by the management of the company to form a new company bearing the same name, for the purpose of taking over the assets of the present company, and to further a scheme for re-organisation. That does not appear to afford any reason whatever, either by itself or in conjunction with the other grounds, for the winding-up of the company, and may be dismissed from further consideration.

Dealing with the first ground, that the substratum of the company is gone, the evidence and material filed do not establish that the company is insolvent or is not in a position to carry on business. It does appear, however, that no dividend has been paid on the preferred stock since June, 1926, and the auditors' reports, notably that for the 9 months ending on the 30th September, 1929, shew that the financial position of the company has not been improving, and that a large part of its capital is locked up in real estate, which the company was obliged to take over on default of payment by the mortgagors. That report also shews that a very considerable amount of the real estate so held is not rented, and it also appears that some of the buildings are in a poor state of repair.

It is the professed intention of the directors of the company, or at least some of them, to engage in other lines of business within the terms of the charter, as it is said that at the present time the business of dealing in second mortgages is not attractive or profitable. It does also appear that at the present time the real estate held by the company cannot be readily or profitably disposed of, owing to the state of the real estate market.

For the company it is pointed out that the petitioner Alexander Butler was, until February of the present year, the general manager of the company, and it is alleged that the present position of the real estate owned by the company is due to a considerable extent

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to his management. That, however, does not relieve the directors from their duty and responsibility in connection with the assets of the company.

The auditors' reports for some years have shewn a state of progressive decline in the company's real estate holdings, and the directors ought to have been familiar with these reports.

Notwithstanding what has been said as to the condition of the company's business, I do not think it can be held that the substratum of the company, or even a substantial part of it, has disappeared. The mere fact that there has been depreciation in the value of its assets, or that the said assets have become frozen instead of liquid, does not establish that the substratum of the company has disappeared.

The authorities are not entirely in harmony on this point, but I think the weight of authority supports the proposition that where the company is established for several purposes it may abandon one of them and carry on the others, and in such case it cannot be said that the substratum of the company has gone: see *The Norwegian Titanic Iron Co. Ltd.* (1865), 35 Beav. 223; *In re New Gas Co.* (1877), 5 Ch.D. 703.

This is an entirely different case from *Re Hamilton Ideal Manufacturing Co. Ltd.* (1915), 34 O.L.R. 66. In that case the company had, almost a year prior to the commencement of the winding-up proceedings, sold the assets, and, outside of the moneys due to the company, the remaining assets were of comparatively small value. No active business was being carried on, and there was no apparent prospect of a resuscitation of the business. Under these circumstances Mr. Justice Kelly considered that the substratum of the company had gone, and therefore held that it was just and equitable to make a winding-up order. To some extent that decision is based upon the decision in *In re Thomas Edward Brinsmead & Sons*, [1897] 1 Ch. 45, where Vaughan Williams, J., held that the very material part of the substratum was gone. The sale of the assets there apparently included the user of the name of the company and the goodwill attached to the business, so that in effect very little of the company's assets was left to carry on business.

The situation in this case is entirely different. The company has all its assets in their depleted form or value, and will, no doubt, realise on the same in time. The present state of the market is not favourable to such a realisation, and I think the company should be allowed, under its new management, to proceed with the realisation of its assets, having regard to the possible

improvement of the real estate market in the near future. A winding-up order would undoubtedly seriously prejudice the realisation of the assets, and upon that ground alone I think that, in the exercise of my discretion, the order should be refused.

Coming to the consideration of the second ground, namely, that there is a deadlock in the management of the company, and therefore it is desirable that a winding-up order should be made, it does appear that there are at present only four directors, although under its by-laws the company should have five directors.

The two petitioners Butler and Luckhart have recently refused or failed to attend the meetings with the other directors or to discuss the management of the affairs of the company with them, so that if there is any deadlock existing, it is largely due to the attitude of these two directors and is created by themselves. This alleged deadlock does not, in the circumstances, constitute a ground for directing a winding-up of the company. A similar situation was considered in *Re James Lumbers Co. Ltd.* (1925), 58 O.L.R. 101, and it was held that where the petitioners created the deadlock, which could be broken or overcome, it did not create such a deadlock as would warrant the Court in making the winding-up order. Here the disagreement between the directors can easily be overcome by the election of a new director either by the directors themselves appointing a director for the balance of the year, or at the next annual meeting of the shareholders, where directors can be elected. In any view, the deadlock is only temporary.

As to the third ground, that there is a lack of confidence in the management on the part of the shareholders, it may be remarked that upon the authorities it must be a justifiable lack of confidence grounded on conduct of the directors in regard to the company's business, and not springing from dissatisfaction at being out-voted on business affairs or on what is called the domestic policy of the company. See *Re James Lumbers Co. Ltd.*, already cited; *Loch v. Blackwood Ltd.*, [1924] A.C. 783.

I do not think there is any evidence here to justify me in holding that the conduct of the directors who have been transacting the business of the company recently is such as to destroy a reasonable shareholder's confidence that the business, if left in the hands of the present management, will be conducted competently and honestly and in the interest of the shareholders.

It may be, as the evidence indicates, that there has been considerable strategy resorted to by both sets of directors in order to obtain control of the management of the company, but that is not sufficient, and from the judgment of Mr. Justice Middleton in *Re Jury Gold Mine Development Co. Ltd.* (1928), 63 O.L.R. 109, it

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would appear that the principle to be deduced from the cases on the point establish that unless there is some fraud in connection with the management of the company, or the directors are conducting transactions *ultra vires* of the company, a majority of the directorate must govern, and the only redress open to minority shareholders is to vote out the directors who offend.

In this case, so far as the material discloses, no fraud or dishonesty in the management of the company by the directors has been shewn. At most it can only be said that the management has not been of the best; and, as one of the petitioners, Alexander Butler, was the manager for some years, it can hardly be open to him to complain of transactions that came under his immediate supervision or direction without apparently any protest on his part.

Considering the several grounds put forward either separately or collectively, I am of opinion that this is not a proper case in which to order a winding-up.

The petitions will be dismissed with costs.

[LOGIE, J.]

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OLIVIER V. SOLLOWAY MILLS & Co. LTD.

April 11.

Landlord and Tenant—Assignment of Lease—Effect of—Exercise of Option of Renewal—Bankruptcy of Assignee—Guaranty—Liability of Guarantors for Rent—Construction of Documents—Subrogation—“Term”—Possession of Demised Premises—Bankruptcy Act, R.S.C. 1927, ch. 11, sec. 126 — 13 & 14 Geo. V. ch. 31, sec. 31—Powers of Dominion Parliament—Interference with Landlord's Civil Rights.

By a lease dated the 17th May, 1927, O. rented to his son certain premises in the Province of Quebec for a term of three years from the 1st April, 1927, ending on the 31st March, 1930. The lease contained a provision that the lessee, upon giving notice before the 1st February, 1930, should have the privilege of renewing the lease for a further period of two years on the same terms and conditions. In October, 1928, the lease was transferred or assigned by the son to B., who was subrogated to all the rights of the son under the original lease and accepted the benefits and obligations contained in the lease and the transfer, O. intervening in the instrument of assignment to consent thereto. By an agreement executed in November, 1928, the defendants guaranteed fulfilment of the conditions of the transfer, including the payment of the rent to O. and his son, the transferor. This agreement contained a clause providing that, should B. become insolvent, O. and his son might claim from the defendants immediate payment of the balance of the sum of \$10,250, being the aggregate amount due by B. under the assignment, and upon payment of that balance the defendants should be entitled to the benefit of the term allowed under the original lease and the transfer thereof. In February, 1929, B. made an assign-

ment under the Bankruptcy Act, by virtue whereof the term created by the lease and transfer became vested in the trustee, who did not elect to retain the premises or to disclaim:—

Held, that, upon the true construction of the instrument of transfer, read in connection with the original lease and the instrument of guaranty, the effect was to exercise the option granted by the original lease and establish the relation of lessor and lessee between O. and B.

Held, also, that the words in the agreement of guaranty, "shall be entitled to the benefit of the term," were not to be read as entitling the defendants to the actual possession of the demised premises.

Cottee v. Richardson (1851), 7 Ex. 143, 151, referred to as to the meaning of the word "term" in a covenant in a lease.

Reference also to the Bankruptcy Act Amendment Act, 1923, 13 & 14 Geo. V. ch. 31, sec. 31, now sec. 126 of the Bankruptcy Act, R.S.C. 1927, ch. 11, and to *In re Stober, Ex p. Mark Workman Investment Corporation* (1923), 4 C.B.R. 34, upon the question of the power of the Dominion Parliament to interfere with a landlord's civil rights. Judgment was given for O. and his son against the defendants, upon their guaranty, for the amount of rent due.

AN action brought by C. F. Olivier and V. A. Olivier, plaintiffs, against Solloway Mills & Co. Ltd., I. W. C. Solloway, and Harvey Mills, defendants, upon an agreement whereby the defendants guaranteed the fulfilment of a certain transfer of a lease, including payment of rent.

The action was tried before LOGIE, J., without a jury, at a Toronto sittings.

E. G. Black, for the plaintiffs.

Gordon Shaver, K.C., for the defendants.

April 11. LOGIE, J.:—By a lease which I will call the headlease, dated the 17th day of May, 1927, C. F. Olivier rented to his son V. A. Olivier certain premises known as 52 Wellington-street north, in the city of Sherbrooke, in the Province of Quebec, for a term of three years from the 1st day of April, 1927, and to be fully ended on the 31st day of March, 1930. The lease contains the following provision:—

"Provided the said lessee shall give written notice to the said lessor on or before the 1st day of February in the year 1930, the said lessee shall have the privilege of renewing and extending the present lease for a further period of two years on the same terms and conditions as this present lease."

By a certain transfer or assignment, which I will for convenience call the sublease, executed by the plaintiffs on the 6th day of October, 1928, and by Maurice J. Boulianne on the 16th day of October, 1928, the above headlease was assigned by V. A. Olivier to Maurice J. Boulianne, and he was subrogated to all the rights accruing in favour of the plaintiff V. A. Olivier under the headlease and accepted the benefits and obligations contained in the

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headlease and the sublease. Charles F. Olivier "intervened" in the sublease, to consent to the transfer, to waive all notices, and for other purposes therein set out. By an agreement dated the 20th day of November, 1928, the defendants guaranteed fulfilment of the conditions of the transfer of lease (the sublease), to wit, among other things, the payment of the rent to the head-lessor, C. F. Olivier, and to the sub-lessor, V. A. Olivier.

The agreement contains the following clause:—

"It is further understood that should the transferee or any of the warrantors become insolvent then the transferor and the lessor may claim from the warrantors, jointly and severally, immediate payment of the balance of the sum of \$10,250, being the aggregate amount due by the transferee under the said transfer, and upon payment of the balance as aforesaid the warrantors or their heirs, executors, administrators, successors, and assigns, as the case may be, shall be entitled to the benefit of the term allowed under the original lease and the said transfer thereof."

On the 12th day of February, 1929, Maurice J. Boulianne made an assignment for the benefit of his creditors under the provisions of the Bankruptcy Act, R.S.C. 1927, ch. 11, and by virtue thereof his property, including the said term created by the said lease and sublease, vested, as of the date of the acceptance and filing of the assignment, in the trustee.

The trustee has not elected to retain the premises for the whole or the part of the unexpired term or to assign or disclaim the whole, pursuant to the Act.

It was contended by the defendants that the sublease did not constitute an exercise of the option of renewing and extending the headlease for a further period of two years, nor did it create any liability on the part of Maurice J. Boulianne to pay the rent on the headlease to Charles F. Olivier.

Upon a careful reading of the sublease alone, both in the original French and as translated by the plaintiffs and defendants, I am of opinion that the effect of it was there and then to exercise the option granted by the headlease and establish the relationship of lessor and lessee between C. F. Olivier and Maurice J. Boulianne, as it unquestionably did as between V. A. Olivier and Boulianne. The warranty dated the 20th November, 1928, was part of the same transaction. By it all three documents are incorporated, and one may be read to explain the others, and, so reading it, it is abundantly clear that the lease bears the meaning which I have put upon it.

It was contended, however, and this was the serious defence, that, the sublease having become vested in the trustee by statutory

authority (sec. 43(k) of the Bankruptcy Act), the trustee had the right to retain for the whole or any part of its unexpired term or to assign pursuant to the Act the sublease above referred to, and in this event it would be beyond the power of the plaintiffs to deliver possession of the premises to the defendants pursuant to the alleged provisions of the agreement of the 20th November, 1928, and that, therefore, this action is without proper foundation, in that the defendants upon payment could not be subrogated to the rights of the creditors because they could not get possession of the demised premises. If the agreement had been that the warrantors upon payment should have been entitled to the "possession of the premises" or that the defendants should have been entitled to the "balance of the term" granted in the original lease, there might be some difficulty.

In June, 1923, Panneton, J., in *In re Stober, Ex p. Mark Workman Investment Corporation*, 4 C.B.R. 34, held that that part of sec. 52(5) of the Bankruptcy Act, as enacted in 1921, by 11 & 12 Geo. V. ch. 17, sec. 41, reading "notwithstanding the legal effect of any provision or stipulation in any lease," etc., etc., is *ultra vires* of the Dominion Parliament, and that it was not competent for Parliament to continue in operation as against the landlord a lease which by its terms had expired by notice given by the landlord under the stipulations of the lease for its termination at the end of the current year at the landlord's option in case of the tenant's insolvency, and forbidding any transfer without the landlord's consent. And by the Bankruptcy Act Amendment Act of 1923, 13 & 14 Geo. V. ch. 31, sec. 31, the attempted interference with the landlord's civil rights, caused by the words contained in sec. 52(5), was recognised as being *ultra vires* of the Dominion Parliament, and that section, as amended by ch. 17 of the statutes of 1921, was repealed and a section was substituted which is now sec. 126 of R.S.C. 1927, ch. 11, in effect restoring these civil rights to provincial jurisdiction. It may be that an agreement executed before insolvency, if it provided for the possession by the warrantor of the demised premises, would take, under the revised section of the Bankruptcy Act, priority as to this over the trustee in bankruptcy.

But it is not necessary for me to decide this case upon that consideration.

The agreement in question says that, upon payment of the whole rent until 1923, the warrantors shall be entitled "to the benefit of the term allowed under the original lease and the said transfer thereof." And this means nothing more or less than that the warrantors are, upon payment, subrogated to the rights of the

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landlords with regard to the lease and the sublease. In other words, the trustee, as long as he retained possession, would pay the rent to the guarantors instead of to the lessors. And, upon the trustee disclaiming, the warrantors would be entitled, as against the lessor and the transferor, to possession of the demised premises. The word "term" in a covenant in a lease may signify either the "time" or the "estate granted" or interest in the tenement, so as to give effect to the intention of the parties: *Cottee v. Richardson* (1851), 7 Ex. 143, at p. 151.

I cannot read the words which I have put in quotation marks above, namely, "shall be entitled to the benefit of the term," as meaning that the warrantors should be entitled to the actual possession of the demised premises. It is quite clear that the provision in the agreement of the 20th November, was to provide against the very thing which has happened, namely, the insolvency of Boulianne, and for the subrogation to the rights of the sublessor and the lessor by the warrantors.

In this view, the amount not being disputed, there will be judgment for the plaintiffs for \$6,635 and interest from the 17th day of February, 1930. The plaintiffs are entitled to their costs.

[APPELLATE DIVISION.]

1930.
April 15.

DORITY V. OTTAWA ROMAN CATHOLIC SEPARATE SCHOOLS
TRUSTEES.

Negligence—Construction by Defendants of Channel through Sidewalk—Injury to Married Woman by Stepping into—Action by Injured Woman and Husband—Findings by Jury of Negligence and Contributory Negligence—Evidence to Sustain—Criticism of Findings—Apportionment of Damages—Effect of Wife's Negligence upon Husband's Cause of Action.

The servants of the defendants having cut through the ice, on top of the sidewalk in front of their school-building, a small channel to permit the escape of water from the school premises to the sewer upon the highway, the married woman plaintiff (L.) while walking past the school premises in March, 1929, slipped and fell at the place where the channel had been cut, and sustained injury. At the trial of an action brought by her and her husband to recover damages for her injury and for his loss and expense incurred thereby, the jury found negligence of the defendants in the construction of the channel and contributory negligence on the part of L.; also that L. and the defendants were equally at fault; and judgment was given at the trial for an apportionment of the damages found by the jury upon that basis:—

Held, upon appeal by the plaintiffs, that the evidence justified the finding of contributory negligence.

The defendants' allegation of contributory negligence was that the plaintiff L. had seen and noted the channel and had walked into it carelessly; the finding of the jury was that she did not take reasonable care in looking where she was going; technically there is a difference, but the allegation of negligence and the findings of the jury are not to be looked at too critically.

Damages having been assessed by the jury to both plaintiffs, it was contended that the finding of negligence on the part of L. could not affect the right of her husband to recover the full amount assessed in respect of his claim:—

Held, that the wife's negligence cut down the award of damages to the husband.

McKittrick v. Byers (1925), 58 O.L.R. 158, applied and followed.

McLaughlin v. Long, [1927] S.S.R. 303, referred to.

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THE following statement is taken from the judgment of MIDDLETON, J.A.:—

An appeal by the plaintiffs from a judgment of Mr. Justice Kelly pronounced on the 2nd November, 1929, after the trial of the action with a jury.

On the 3rd March, 1929, the servants of the defendants had cut through the ice on top of the sidewalk, in front of their school, a small channel to permit the escape of water from the school premises to the sewer upon the highway. The plaintiff Laura Dority, while walking past the school premises, slipped and fell at the place where this channel had been cut and sustained serious damage. This action was brought charging negligence, and was met by a counter-charge of contributory negligence.

At the hearing questions were submitted to the jury. In answer to these questions, the jury found negligence by the defendants in the construction of this drain or channel and also contributory negligence on the part of Laura Dority, which is described thus: "Laura Dority did not take reasonable care in looking where she was going, especially at that time of the year." The damages of Laura Dority were assessed at \$2,666.66, and the damages sustained by her husband and co-plaintiff Frederick Dority were assessed at \$1,000, and it was found that the plaintiff Laura and the defendants were equally at fault, and therefore the damages should be apportioned 50 per cent. to the plaintiffs and 50 per cent. to the defendants. The trial Judge directed that judgment should be entered in accordance with the findings.

February 3. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

Redmond Quain, for the appellants. The contributory negligence found against them is not negligence in law. The defendants created a nuisance in the form of a channel through the ice on the sidewalk, not as the owners of the land but as strangers and

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trespassers. If the appellant Laura Dority owed a duty to the city corporation to watch where she walked, there was no such duty to these defendants. They cannot avail themselves of a duty owed to some one else. In any event, the only duty on the part of Laura Dority towards any one was a duty not deliberately to submit herself to a danger of which she was aware. The negligence found was not the negligence alleged in the pleadings or at the trial. To be guilty of negligence the plaintiff Laura Dority must not only have seen the danger, but must also have appreciated it as such, and have deliberately undertaken the risk. In any event, the negligence of the wife is no defence to an action by the husband. Reference to *British American Oil Co. v. Shurr*, [1929] 3 D.L.R. 119; *Stockton Automobile Co. v. Confer* (1908), 154 Cal. 402; *Keachie v. City of Toronto* (1895), 22 A.R. 371; *Knowlton v. Hydro-Electric Power Commission of Ontario* (1925), 58 O.L.R. 80; *McLaughlin v. Long*, [1927] S.C.R. 303, at p. 311; *Edwards v. Porter*, [1925] A.C. 1, distinguishing it; *McKittrick v. Byers* (1925), 58 O.L.R. 158.

Jean Genest, for the defendants, respondents. A person is bound to exercise care in doing even what he has a right to do and to use his faculties to protect himself. This duty is owed to himself. The jury's finding is not that the trench was a nuisance or that the defendants were trespassers, but otherwise. The negligence found was the negligence on which the issue was tried. The statement of defence is wide enough to include the negligence found by the jury. Contributory negligence is an answer even where the cause of the accident is a nuisance: *Denton on Municipal Negligence* (Highways), pp. 314-15; *Butterfield v. Forrester* (1809), 11 East 60; *Dahlin v. Walsh* (1906), 192 Mass. 163; *Elliott on Roads and Streets*, 4th ed., p. 1184. Under the Contributory Negligence Act, the husband can only recover the proportion corresponding to the degree of fault of the defendant: *Knowlton v. Hydro-Electric Power Commission of Ontario*, *supra*; *Beven on Negligence*, 4th ed., p. 788.

April 15. The judgment of the Court was read by MIDDLETON, J.A. (after setting out the facts as above):—The finding of contributory negligence on the part of the plaintiffs must be confined to the plaintiff Laura Dority.

The defendants did not appeal from the verdict or from the judgment which followed it. The plaintiffs on the other hand, do appeal, complaining of the finding of negligence on the part of the plaintiff Laura, and also contending that, although under the Contributory Negligence Act such contributory negligence

would justify, if the finding is sustained, an apportionment of the damages sustained by the plaintiff Laura, it cannot in any way affect the right of the husband-plaintiff to recover the full amount of the damage sustained by him. The husband's claim was based upon the loss of his wife's society and services for 12 weeks and the expense he was put to in nursing her and for medical attendance and hospital care.

The evidence shews that as Mrs. Dority was walking along the street she met some lady friends with whom she exchanged some passing remarks. To use her own words: "As I said good-bye I took a step and into the drain I went with my left foot. I was walking along thinking that the sidewalk would be in proper condition for us to walk on; my attention was drawn to the girls; they shouted out to me as any friend would, and I was looking at the girls. I took that one step and into the drain I went." In conversation after the accident she said she saw the drain before making the step, and stepped into it—"I saw it all right, but I turned around to talk to these young girls and when I turned back I stepped into it."

The appeal by the plaintiffs is based upon the theory that what is relied upon by the jury is not in law negligence, and further that the negligence found is not the negligence that was charged or contended for at the trial.

In the statement of defence it is said that Mrs. Dority was at the time of the accident leaving some friends and walking backward, although she had previously seen and noted the ditch in the sidewalk.

The finding of the jury, it is said, is different, because in the view of the jury, she did not take reasonable care in looking where she was going. Technically there is a difference, but the allegation of negligence and the answers of the jury are not to be looked at too critically. It is, no doubt, a different thing to say that she walked into the ditch without seeing it and to say that seeing it she walked into it carelessly. But the case cannot be permitted to turn upon such nice discrimination.

Then it is said that there was no evidence upon which the jury could find negligence. It might well be that the jury could have absolved Mrs. Dority from the charge of negligence, but the question was entirely one for them.

I have quoted substantially the whole evidence, and upon it there was, I think, enough to justify the finding, and we cannot interfere.

This leaves the serious and difficult question as to the effect of the wife's negligence on the husband's cause of action. There are

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two recent decisions in our own courts: *Knowlton v. Hydro-Electric Power Commission of Ontario*, 58 O.L.R. 80, where Mr. Justice Grant held that the wife's negligence cut down the award of damages to the husband; and *McKittrick v. Byers*, 58 O.L.R. 158, where the Second Divisional Court held that the negligence of an infant cut down the award of damages to his father, and the decision in *Knowlton v. Hydro-Electric Power Commission of Ontario* is referred to with approval. The decision in the *Knowlton* case is, of course, not binding upon the Court, but it does not appear to us that there is any room to distinguish between the case of father and child and husband and wife, and we ought therefore to follow the decision of the other Division and affirm the finding of the learned trial Judge.

In the case of *McLaughlin v. Long*, [1927] S.C.R. 303, an appeal from a decision in another Province, the Supreme Court of Canada indicated that, so far as that Court was concerned, the question must be regarded as open, but this, although naturally shaking our confidence in the decision of our own Court, does not warrant an independent investigation of the problem presented.

The appeal should, for this reason, be dismissed with costs.

Appeal dismissed.

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CAPITAL BUILDING CLEANERS V. SLATER-SHERWOOD.

April 15.

Negligence—Damage to Goods in Shop-window—Entry of Water and Acid used in Cleaning Face of Building—Evidence—Res Ipsa Loquitur.

The plaintiffs agreed with the defendants to clean the brick and stone front of a block of stores. The defendants' agent knew that acid would be used in the cleaning, but the method to be adopted was not known to the defendants. During the cleaning, water mixed with acid entered a display-window of one of the stores and damaged the goods in the window, stained the varnished floor, etc. The evidence for the plaintiffs was, that they had taken precautions to cover the awnings, and did not know how the water and acid got inside the window. On behalf of the defendants it was shewn that the windows were properly protected and that rain could not enter. The plaintiffs sued for a balance of the contract price of the work they did, and the defendants counterclaimed for damages for the negligence of the plaintiffs in permitting the water and acid to get into the building:—

Held, that the onus was upon the plaintiffs to account for the entry of the water and acid, and this they had failed to do.

The thing being shewn to be under the management of the plaintiffs, and the accident being such as in the ordinary course does not

happen if those who have the management use proper care, there is reasonable evidence, in the absence of explanation by the plaintiffs, that the accident arose from want of care.

Scott v. London and St. Katherine Docks Co. (1865), 3 H. & C. 596, and later cases, applied and followed.

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AN appeal by the defendants from the judgment of the First Division Court of the County of Carleton in favour of the plaintiffs for the recovery of \$179.93 as the balance of the contract price for cleaning the brick and stone front of a building in the city of Ottawa, and dismissing a counterclaim for damages for injury caused by acid and water, used by the plaintiffs, getting into the building.

March 4. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

A. W. Greene, K.C., for the appellants. The plaintiffs having undertaken to do the work and in so doing having without the appellants' knowledge used an acid, which is a dangerous article, and, the damage having been discovered immediately after the presence of the workmen of the plaintiffs, the onus is on the plaintiffs to shew that the acid and water entered the premises of the appellants through no negligence on the part of their workmen or because of some defect in the building of which they were not aware, and the learned trial Judge erred in not so finding. Reference to *Belway and Parnett v. Serota* (1919), 47 D.L.R. 621; Halsbury's Laws of England, vol. 21, p. 439, para. 751; *Nautilus Steamship Co. Ltd. v. David and William Henderson & Co. Ltd.*, [1919] Sess. Cas. 605.

W. J. Green, for the plaintiffs, respondents. They have disproved any negligence in their cleaning operations, and that shifts to the appellants the onus of proving that there was no defect in their building. The respondents cannot be held liable for damages caused by a defect in the appellants' building which they had no reason to anticipate, when, as the evidence shews, their work was carried on without negligence and in a workmanlike manner. Reference to *Polson Iron Works Ltd. v. Laurie* (1911), 3 O.W.N. 213; *Honnemeyer v. Fischer* (1905), 27 Ohio Cir. Ct. 8.

April 15. The judgment of the Court was read by HODGINS, J.A.:—The defendants appeal from the judgment of his Honour Judge Daly, Judge of the County Court of the County of Carleton, in favour of the plaintiffs for the sum of \$179.33, which judgment also dismissed the defendants' counterclaim.

The contract between the parties was a very simple and informal one. It was an agreement to clean the brick and stone

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front of a block of stores in Sparks-street, in the city of Ottawa, for the sum of \$300. The defendants' agent knew that acid would be used in the cleaning, but, as Bethell, a member of the plaintiffs' firm, himself testifies, the method to be adopted was not known to the defendants. During the course of the cleaning, water mixed with acid in some way entered the shop-window of one of the stores occupied by Cowan & Page, tailors; and damaged some of the cloth-goods or cloth-ends in the window, stained the varnished floor, and, as is suggested but not proved, damaged some electric bulbs in the ceiling lights. The evidence for the plaintiffs was, that they had taken precautions to cover the awnings, and were not aware how the water and acid got inside the window.

On behalf of the defendants it was shewn that alterations were made in the building in question some two years ago and that the windows were properly protected and that rain could not possibly enter, and no previous damage had been done to Cowan & Page by water from a rain-storm—Cowan & Page had been tenants there for 20 years.

The method used by the plaintiffs is thus described by Bethell:—

"A. We started in in the evening and started to clean it the only way it could possibly be done, we went to work and see that everything was protected before we start to work, that is, the awnings.

"Q. What did you do with respect to the awnings? A. We covered them with tar-paper, and then we put tarpaulins over the tar-paper.

"Q. Where did you start on the building? A. We started on the west side of the building, over Caplan's.

"Q. What did you do, or what did you use, to get at this building? A. We used a swing scaffold, a 14-foot stretch of the building.

"Q. What did you do to clean the face of this building, the brick? A. We used an acid.

"Q. Oh, you used an acid in the water? A. Yes, a slight solution.

"Q. You washed the building all the way down? A. Yes.

"Q. Will you kindly tell me how this cleaning operation was carried on? A. How the actual cleaning of the brick and stone was done?

"Q. Yes, about the use of the acid? A. We have a pail and brush, and it is put on the face of the brick and stone, and then it is washed off afterwards with a hose.

"Q. What kind of acid do you use? A. Muriatic acid."

The acid solution used in washing the building all the way down was put on the face of the brick and stone with a pail and brush and then washed off afterwards with a hose. Mr. Bethell on examination was asked by the learned County Court Judge, "Where did this water come from?" His answer was, "We had a hose." And to a further question by his Honour, "Where did the water come from that was in the window?" his answer was, "Well, I cannot say."

It appears from his further evidence that he saw the water "about half a gallon . . . may be a little more," in the window the next morning (he worked at night). He says that it is not a usual thing for the water to enter the shop windows and do damage, and only recalls one case (Plaunt) where it did drip in. Cowan, the tenant, said the water had run down inside the window on to the floor and had saturated the cloth there. A builder, Douglas, who had altered the shop-windows of the Cowan & Page store two years before, testifies that the cornice would keep out the rain, but that water directed by a hose against the building on any one spot might get in at the top and work down.

The proper rule to be applied in this case is laid down by the Exchequer Chamber in *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 601, in these words:—

"There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

That was a case where bags of sugar fell upon a customs officer who was passing a warehouse. The rule *res ipsa loquitur* was applied, on the principle explained in the sentence which I have quoted from the judgment.

This principle was adhered to and expressed in much the same terms in *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652, 663, where Lord Justice Fletcher Moulton says:—

"Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a *primâ facie* responsibility for what happened."

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More recently and during last year the *Scott* case has been applied by two Divisional Courts, consisting of two Judges, of the Court of Appeal in England.

One was a case of skidding by a motor-car on to the pavement where the plaintiff was injured, *Ellor v. Selfridge and Co.* (1930), 46 Times L.R. 236, and it was held by Scrutton and Romer, L.J.J., that the defendants were obliged to account for their presence there and disprove negligence.

The other case was before Lord Hanworth, M.R., and Romer, L.J., *Hinton v. Gilchrist*, Daily Times of March 8, 1930, where a motor-car mounted the pavement and injured a boy whose father sued under Lord Campbell's Act for damages. The rule in the *Scott* and *Wing* cases was approved, but the action was dismissed on the ground that the defendants had discharged the onus upon them.

As may be seen, the facts in this case are exceedingly simple. The water and acid which stained the cloth could only have been part of the material used by the plaintiffs. They undertook to clean the face of the building, consisting of stores on the street level, each with windows. There were also windows in the floor above. The whole operation was within their sole control and management, and part of that management consisted in driving water with force against the face of the wall to wash away the acid. This necessarily would cause the mixed water and acid to run down the face of the wall. It would seem therefore clear that it lay upon the plaintiffs to account for the entry of the water and acid inside the windows. This they have failed to do. The only fact they allege is that a heavy rain occurred which might have got in and caused the damage complained of, but this is met by evidence from the contractor who altered the building, that they were fully protected against rain, but that water driven with considerable force against particular spots, and not falling as rain falls, might cause penetration inside the window. It was also shewn that rain had never before entered this shop-window.

Applying the principle I have cited, I have come to the conclusion that the learned County Court Judge was wrong; and, as the parties are satisfied that no question will be raised as to the right of the defendants to counterclaim for damage to the goods of their tenant, or as to the amount of damage, the present judgment will be set aside and the plaintiffs' action dismissed with costs and the appeal allowed with costs.

Appeal allowed.

[APPELLATE DIVISION.]

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April 15.

Criminal Law—Unlawful Possession of Opium—Opium and Narcotic Drug Act, R.S.C. 1927, ch. 144, secs. 4(d), 15—Magistrate's Conviction—Appeal—Evidence—Onus.

Section 15 of the Opium and Narcotic Drug Act, R.S.C. 1927, ch. 144, does not mean that any person having not actual but only constructive occupation, control or possession of any building, etc., in which any drug is found, shall be deemed to be in unlawful possession of the drug unless he proves the contrary. The words "occupies, controls or is in possession of any building," etc., in sec. 15, are not used in their widest, but in a limited, sense—the occupation, control or possession must be of a nature to support the charge against the accused person; otherwise the presumption of possession does not arise.

Opium was found by the police in the house of the accused, but he was absent at the time, and testified (and was not contradicted) upon his trial before a police magistrate upon a charge of unlawful possession of a narcotic drug, that the opium found was not there with his authority, knowledge, or consent. The magistrate disbelieved the accused and convicted him:—

Held, upon appeal, that the accused had discharged the onus cast upon him, and the conviction should be quashed (MAGEE and HODGINS, J.J.A., dissenting).

The magistrate did not state his reasons for disbelieving the accused. Evidence under oath, until shaken, is entitled to some weight, and it cannot be swept away by the judge or magistrate simply saying that he disbelieves a witness.

Per MAGEE and HODGINS, J.J.A.:—As the accused had not been able to satisfy the magistrate of his credibility, it could not be said that the onus had been satisfied.

AN appeal by the defendant from his conviction and sentence upon summary trial by one of the Police Magistrates for the City of Toronto upon a charge of being unlawfully in possession of a narcotic drug, contrary to sec. 4(d) of the Opium and Narcotic Drug Act, R.S.C. 1927, ch. 144.

March 6. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

E. C. Bogart, for the appellant. There is no evidence to connect him with the opium found, he being out of the city at the time the police entered his premises. Evidence as to what was found in the shed was improperly admitted at the trial over the objection of counsel, because it was not part of the property rented by the appellant.

T. N. Phelan, K.C., for the Crown. The Act has made it clear that the occupier of a room or house where opium is found is to be deemed guilty unless he convinces the magistrate that he is innocent. The magistrate in this case did not believe the accused,

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and the finding should not be disturbed. The "occupation" to which the Act refers is not the occupation at the moment of the seizure.

April 15. The judgment of the majority of the Court was read by MULOCK, C.J.O.:—The accused was tried summarily and convicted by Police Magistrate Brown of the offence of having unlawfully in his possession a narcotic drug, namely, opium, contrary to sec. 4(*d*) of the Opium and Narcotic Drug Act, R.S.C. 1927, ch. 144, and was sentenced to 18 months' imprisonment with hard labour, a fine of \$500, \$4 costs, and in default of payment of the fine and costs to imprisonment for the further period of 6 months, and was recommended for deportation. From such conviction and sentence the accused appeals.

Hugh P. Mathewson, for the Crown, and the prisoner on his own behalf, were the only witnesses. Mathewson, a police constable, testified to the following effect. At about 11.30 p.m. on the 19th January, 1929, he, along with some other constables, by force entered the residence of the accused, being premises number 35 Centre-avenue, in the city of Toronto. They noticed a smell of opium caused by the smoking of opium. On entering the bedroom, wherein at the time were the wife of the accused and a Chinaman called George Pong (who resided elsewhere in Toronto), they found under the bed a can containing a small quantity of opium. The conviction was in respect of that opium. Mathewson first swore that it was found on top of, later underneath, a suit-case; in the coal-stove they found a charred piece of tubing, and in the room an "improvised" opium lamp and some knives, the blades of which Mathewson said were stained with opium. They also found some papers, cigarette papers, used for making up "decks," a slang expression meaning a small quantity of opium.

Much irrelevant evidence was admitted.

The accused was not in Toronto when the opium in question was found in his house. On the previous day he had gone to Niagara Falls to negotiate for the purchase of a restaurant there, and did not return until the following Tuesday, when Mathewson had a conversation with him, and the accused denied all knowledge of the opium in question. Mathewson swore that the wife of the accused informed him that she had been smoking opium; that she had a cold, and that opium was used for a cold; that she always kept a little bit of opium on hand for a cold; and also swore that the accused corroborated her statement. The conversation between Mathewson and the accused and his wife was conducted by means of an interpreter, and from this meagre account of a conversation

so conducted it is impossible to determine which of her various statements the accused may have admitted to be true. Inasmuch as at the trial he denied all knowledge of the opium in question, it is most improbable that he made to Mathewson any admission of unlawful possession of it; and the alleged corroboration, in my opinion, possesses no evidential value.

On the conclusion of the evidence the magistrate said: "There will be a conviction; I disbelieve the evidence of the accused."

In discrediting a witness every judicial officer owes it to the witness and also to an appellate court to state his reasons. This the convicting magistrate has not done. Evidence under oath, until shaken, is entitled to some weight, and it cannot be swept away simply by the trial judge saying he disbelieves a witness. In this case the evidence of the accused is uncontradicted and is entitled to some weight.

The proper and material findings of fact from the evidence are, in my opinion, the following: that on the 18th day of January, 1929, the accused left Toronto for Niagara Falls, and remained absent from Toronto until the following 22nd January; that there is no evidence of any opium being in his house at the time of his departure; that opium was found in his house on the night of the 19th January; that in the room where the opium was found were the wife of the accused and a Chinaman whose residence was elsewhere in Toronto; and that the opium in question was in the house without the accused's authority, knowledge or consent.

Under sec. 15 of the Opium and Narcotic Drug Act, proof that the prohibited drug was in possession of a person "without his authority, knowledge or consent" releases him of liability under the Act, and I am of opinion that the accused discharged the onus cast upon him, and that therefore the conviction should be quashed.

Also on another ground I think the conviction cannot stand.

Section 15 of the Act is as follows: "Without limiting the generality of paragraph (d) of section 4 of this Act, any person who occupies, controls or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug is found, shall, if charged with having such drug in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof."

Does this section mean that any person having not actual but only constructive occupation, control, or possession of any build-

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ing, etc., in which any drug is found, shall be deemed in unlawful possession of the drug unless he proves to the contrary? Suppose a resident in Canada locks up his house, leaving it unoccupied, and goes abroad, and during his absence some unknown person, carelessly or maliciously, leaves some opium on the premises, where it is found, and the absent owner, being charged with unlawful possession, goes into the box and swears that it was there without his authority, knowledge or consent, he may make such a bad, though absolutely truthful, witness that the magistrate is warranted in not accepting his evidence and holds that he has not discharged the onus of proving his innocence. In such case, according to the interpretation put upon the section by the magistrate, he is liable under the Act to imprisonment up to 7 years. In infinite ways such an interpretation of this Act might work the grossest injustice, and it is inconceivable that Parliament contemplated so imperilling justice.

In my opinion, the words in sec. 15, "occupies, controls or is in possession of any building," etc., are not used in their widest, but on the contrary in their limited, sense, namely, that such occupation, control, or possession must, under the circumstances, be of a nature which goes to support the charge, otherwise the presumption of possession does not arise.

MAGEE, J.A. (dissenting):—Gun Ying appeals against his conviction and sentence on summary trial before Mr. Brown, Police Magistrate for Toronto, on the 1st February, 1929, for having in his possession on or about the 19th January, 1929, at Toronto, a narcotic drug, to wit opium, contrary to the Opium and Narcotic Drug Act.

That Act, R.S.C. 1927, ch. 144, by sec. 4 (para. *d*) declares guilty of a criminal offence any person who has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority. By sec. 2(*d*) "drug" means any substance mentioned in the schedule to the Act, and that schedule mentions opium. By sec. 13, the onus of shewing authority is cast upon the defence; by sec. 15, any person who occupies or is in control or possession of premises on which a drug is found shall, if charged with possession of the drug, be deemed to have been so in possession unless he prove that it was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession.

Section 24 provides for deportation of an alien convicted under the Act.

The appellant in January, 1929, lived with his wife at house No. 35 Centre-avenue, Toronto, which consisted of 4 rooms. South of it was No. 33, formerly a synagogue, but then used as a second-hand store. It had an L shape. At the back of the yard of No. 35 was a shed, which had a door opening to the yard of No. 35, and also a door or doors to No. 33. Near midnight on Saturday the 19th January, 1929, police officers forced the door of No. 35 and entered and they noticed the fumes as of some one smoking opium. In the house was the appellant's wife and in a bedroom was a Chinaman called Pong. In the fire in the coal-stove was a small article appearing to be about 6 inches long and tubular, which the officer, who was the only witness for the prosecution, thought was probably a stem of a pipe. It was partly burned and he could not recover it. In one room he found what he calls an improvised opium lamp and also some knives with the blades stained with opium, also some cigarette papers such as he says are always used for making up "decks" or small quantities of opium as sold to addicts, and also some larger sheets of similar paper which could be cut into nine of the smaller size. He also found two letters, and under the bed under an old suit-case a can containing a small quantity of opium. That was the only opium found in the house. The officers went to the shed, but the door facing No. 35 was fastened from the inside; so they went to the doors on the other premises and broke in and so opened the door to No. 35. In the shed they found a tin of opium worth from \$75 to \$100. They also found two pipe-bowls with opium and sheets of paper similar to that found in the house. One pipe had a piece of rose ribbon stuffed into it as if to hold the stem tight, and this ribbon was similar to ribbon found in the house, a piece from which appeared to have been similarly used. Some days later a small "deck" of opium was found in the shed wrapped in paper similar to the other. The officer considered that the improvised lamp and the tube in the stove and some yenhocks, somewhat like hairpins, for probing and cleaning pipes, were part of an opium-smoking "lay-out." Although they had noticed the fumes, the officers did not handle the lamp to ascertain if it was warm, though the stem in the stove would indicate a hurried disposal of articles. The police had before the trial been interviewing the landlord of No. 35, who also owned No. 33, but evidently had not learned that the appellant had any control over or possession of the shed, for no witness was called to prove that he had or even that he had access to it, and the Crown witness conceded that he did not rent it. The appellant was the only witness for the defence, and he denied having anything to do with the shed or any

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App. Div. of the articles therein. It must, I think, be taken that it has
1930. not been proved that any of the articles in the shed were in prem-
ises of which he was in possession or occupancy. That leaves only
REX in question the articles found in the house. The opium, then, is
v. of course the only item really in question. The others only bear
GUN YING. on the question of his possession of it. He was absent from the
Magee, J.A. house at the time of the seizure and was said by Pong to be at
Hamilton but by the wife to be "down in Chinatown." He swears,
but is not corroborated, that he had left Toronto on Friday morn-
ing and was at Hamilton and Niagara Falls on business and
returned on Thursday after being telephoned of the police trouble.
It might well be that his Chinese friend in his absence had in-
dulged in a smoke of opium, and on disturbance by the police have
thrown the pipe stem into the stove and the opium under the bed.
The appellant positively denied all knowledge of the opium or the
articles for smoking it—but the police officer stated that after
the appellant's return he had in his presence asked the appellant's
wife about the can under the bed and if she had been smoking
opium, and she had said that she had a cold and it was used for a
cold and she always kept a little bit of opium on hand for a cold,
and the officer says her husband corroborated her. This would be
inconsistent with his subsequent total denial, and the wife was
not offered as a witness. The Police Magistrate promptly found
the charge proved and said he disbelieved the appellant's evi-
dence. The onus is, by sec. 15, cast upon the accused; and, as he
has not been able to satisfy the magistrate of his credibility, it
cannot, I think, be said that the onus has been satisfied. His two
letters found in the house, in one of which he inquires about the
price of "black goods" in Vancouver, and their transportation,
give rise to suspicion as to his readiness at least to deal in un-
usual goods which his explanations hardly remove.

The appeal should, I think, be dismissed.

HODGINS, J.A., agreed with MAGEE, J.A.

Appeal allowed (MAGEE and HODGINS, JJ.A., dissenting).

[APPELLATE DIVISION.]

BANK OF TORONTO v. STILLMAN.

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April 15.

Judgment — Summary Order under Rule 57 — Action on Promissory Note—Affidavit of Merits—Defence—Practice.

In an action commenced in a County Court by specially endorsed writ, upon a promissory note made by the defendant in favour of W. and transferred by W. to the plaintiffs, the defendant by his affidavit of merits set up the defence that the plaintiffs gave no value for the note and are not the holders thereof for value and merely hold it as agents for the W. company, at whose request and for whose accommodation he signed the note. The defendant was cross-examined upon his affidavit, but the allegation that the note was an accommodation one was not displaced. The defence was based upon information given by W., who, the defendant swore, told him that he never got any money for the note, that he did not discount it, but put it in as "collateral." Upon the plaintiffs' motion under Rule 57, an order was made in the County Court for summary judgment:—*Held*, that the defendant had shewn a good defence, and was entitled to defend the action.

The meaning of Rule 57 and the practice under it explained.

Jacobs v. Booth's Distillery Co. (1901), 50 W.R. 49, 85 L.T.R. 262, followed.

AN appeal by the defendant from an order of LEE, Jun.Co.C.J., in an action in the County Court of the County of York, upon a promissory note, directing judgment to be entered in favour of the plaintiffs, upon a summary application under Rule 57.

March 6. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

G. T. Walsh, K.C., for the appellant. The defence is that the appellant signed the note as a surety or accommodation maker and that the plaintiffs are not holders for value. He has raised in his affidavit of merits a triable issue and is entitled to have the case proceed to trial. Reference to *Farmer v. Ellis* (1901), 2 O.L.R. 544.

J. W. Pickup, for the plaintiffs, respondents. The affidavit of merits shews that the appellant has himself no knowledge of the allegations made. Under sec. 55 of the Bills of Exchange Act, R.S.C. 1927, ch. 16, the presumption is that the respondents are holders for value. The onus is on the appellant to prove otherwise. It is not sufficient for him to swear that the note was an accommodation one if in the hands of a holder for value. Reference to *Muir v. Cameron* (1853), 10 U.C.R. 356, and secs. 54 and 58 of the Bills of Exchange Act. If the defence is that the note is held as collateral, in order to be entitled to defend the appellant must plead that the debtor is not indebted to the respondents for the full amount of the note. That has not been done here.

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Walsh, in reply, referred to *Maclaren on Bills and Notes*, 5th ed., pp. 180, 181. If the note was taken as collateral the onus is on the respondents to prove that the amount is owing by the debtor: *Molsons Bank v. Stearns* (1905), 6 O.W.R. 667; *Sterling Bank of Canada v. Zuber* (1914), 32 O.L.R. 123.

April 15. The judgment of the Court was read by MIDDLETON, J.A.:—Appeal by the defendant from an order made by his Honour Judge Lee of the County Court of the County of York giving judgment in favour of the plaintiffs upon a summary application under Rule 57.*

The action commenced by a specially endorsed writ upon which the plaintiffs claimed \$595 against the defendant as the maker of a promissory note of which the plaintiffs are said to be the holders. The note bears date the 28th June, 1929, is in favour of the Weisbrod Fur Company Limited, and is payable on the 1st December, 1929.

The defendant filed an affidavit of merits in which he swears that he is not indebted to the plaintiffs in the sum claimed or in any other sum and that he has a good defence to the action. He then alleges that the note was given as an accommodation note and without any consideration or value received, and that this was known to the manager of the plaintiff bank.

This affidavit is clearly insufficient, as the mere fact that the note is known to be an accommodation note is not in itself any defence if the plaintiff is the holder in due course.

Upon the hearing of the motion for judgment, leave was given to file a further affidavit, and this was done, the defendant swearing that "the plaintiffs gave no value for the said note and are not the holders of the same for value and merely hold same as agent for the Weisbrod Fur Company Limited, the payees of the said note, at whose request and for whose accommodation I signed the same." If this be true, of course it constitutes a good defence. Upon this affidavit a cross-examination took place.

The note is produced and is identified. The fact that the note was in truth an accommodation note is not displaced.

The defence is shewn to rest upon information given by Weisbrod, who, the defendant says, told him that he "never got any

*57.—(1) Where the defendant appears to a writ specially endorsed and files an affidavit of merits, the plaintiff may cross-examine upon such affidavit and move for judgment, and if the court is satisfied that the defendant has not a good defence to the action on the merits, or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action, judgment may be given for the plaintiff.

money for them, he did not discount them, he put them in as collateral." Upon this the learned County Court Judge gave judgment for the plaintiffs.

In my view, this judgment cannot stand; it is based upon an entire misconception of the meaning and effect of the Rule.

Courts exist for two distinct purposes: first, for the determination of disputed rights; secondly, for the enforcement of rights which are not disputed or which have been determined judicially. It has been the endeavour of legislators for many years to devise some method of determining whether there is in truth a dispute as to the right which the plaintiff alleges; if there is a real dispute, then that dispute must be determined by a trial in the ordinary course of the Court. If there is no real dispute, and the defendant merely seeks to delay the plaintiff in the enforcement of his remedy, there should be some method by which this vexatious disputation may be ended.

When the Judicature Act was passed, it was sought to attain this end by enabling a plaintiff, as soon as an appearance had been entered to a specially endorsed writ, to file an affidavit shewing the existence of his cause of action and his belief that there was no defence, and that the appearance had been entered for the purpose of delay only, and upon the strength of such affidavit to move for judgment. The defendant could then answer this motion by shewing what was designated a "*bonâ fide*" defence, which really meant that he was, in good faith and in the honest belief that he had a triable defence, endeavouring to set up this defence for his own protection and not for the purpose of hindering and delaying the plaintiff. The officer hearing the motion for judgment was then called upon, not to try the action in any sense, but to determine whether the defence was being set up in good faith and honesty; this generally involved a cross-examination upon the defendant's affidavit. If the alleged defence was shewn to be vexatious, the plaintiff might succeed upon his motion; but, failing this, it was realised that it was not the function of the officer upon the motion to determine any controversy either of law or fact but to leave this duty to the trial tribunal. As time went on, a tendency developed to magnify the powers of the officer upon the hearing of the motion, and jurisdiction was assumed to determine disputes.

This evil tendency was finally put an end to by the decision of the House of Lords in *Jacobs v. Booth's Distillery Co.* (1901), 50 W.R. 49, 85 L.T.R. 262. There, a judgment having been granted to a plaintiff upon the theory that the defence appeared to be shadowy and ill-founded, the House of Lords reversed the deci-

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sion. Lord Halsbury, L.C., said (85 L.T.R. at p. 262): "I am of opinion that this judgment ought to be reversed. I am somewhat surprised at the decision that has been arrived at by the tribunals before whom this question has come. I think that if this is an example of the mode in which Order XIV. is administered, it would be desirable for the Legislature to consider whether that Order should continue to be put in force. People do not seem to understand that the effect of Order XIV. is not that, upon the allegation of the one side or the other, a man is not to be permitted to defend himself in a court. . . . Order XIV. was intended to prevent . . . sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to parties who were endeavouring to enforce their rights. . . . I am bound to say that it startles me to think that in a case of this sort an order should be made the effect of which is that the defendant is not to be heard to make his defence." Lord James of Hereford supplements this by saying: "The tribunal to which the application is made should simply determine, 'Is there a triable issue to go before a jury or a court?' It is not for that tribunal to enter into the merits of the case at all. It ought to make the order only when it can say to the person who opposes the order, 'You have no defence, you could not by general demurrer, if it were a point of law, raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact.'"

That being the state of the law, when our Rules were revised it was sought to simplify the procedure, leaving the principle unchanged. To avoid the making of many motions based upon affidavits which were doomed to failure, as soon as an affidavit of merits was filed it was provided that the defendant should in each case file an affidavit of merits in the first instance. If this did not disclose a triable defence, it was open to the plaintiff then to launch his motion for judgment, based upon the insufficiency of the affidavit: no affidavit from the plaintiff being required or permitted because the Court could not enter into a discussion of controverted facts. The plaintiff is also permitted to cross-examine upon the affidavit and then to launch his motion if he thinks that on the cross-examination the affidavit has been broken down. There is now a duty to refuse the judgment unless the Court is satisfied that the defendant has not a good defence to the action or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action.

It must also be borne in mind that where the defendant has shewn sufficient to shift the onus to the plaintiff, judgment cannot be granted, and care must be taken to see that where the

defendant cannot himself know the facts he is not prejudiced by reason of his personal ignorance, for he may well be able to prove, *aliunde*, the facts which will entitle him to succeed at the trial. If he has pledged his oath to belief in the existence of these facts, there should be an opportunity to have them investigated. As put by Collins, M.R., in *Wells v. Allott*, [1904] 2 K.B. 842, 848, when there are facts to be investigated, "the Judge at Chambers exercising jurisdiction under Order XIV. is not the proper tribunal to make that investigation. The proper tribunal to conduct the investigation is the tribunal which tries the action and which will have the witnesses before it."

In the case in hand it shocks one's sense of justice to realise that a judgment has been granted to this plaintiff bank without a word of evidence from it to shew the existence of its claim, merely because one may be very suspicious as to the defendant's ability to establish the defence he has sworn to. If this is the way the practice is to be administered, I would echo the sentiment that Lord Halsbury expressed: that the Rule, which has proved, when rationally administered, most beneficial, should be immediately repealed.

I think the appeal should be allowed with costs, and that the motion for judgment should be dismissed, but, under the circumstances, the costs in the court below should be in the cause.

Appeal allowed.

[APPELLATE DIVISION.]

DAYEY V. GIBSON.

1930.

April 15.

Company—Bankruptcy—Unpaid Claims for Wages—Ontario Companies Act, sec. 100—"Gone into Liquidation."

Bankruptcy is a "going into liquidation" within the meaning of sec. 100(1) (b) of the Companies Act, R.S.O. 1927, ch. 218.

Horsey Estate Co. Ltd. v. Steiger, [1898] 2 Q.B. 259, [1899] 2 Q.B. 79, and *Fryer v. Ewart*, [1902] A.C. 187, applied and followed.

Judgment of KELLY, J., (1929), 64 O.L.R. 627, affirmed.

AN appeal by the defendants from the judgment of KELLY, J. (1929), 64 O.L.R. 627.

February 7. The appeal was heard by MAGEE, MIDDLETON, ORDE, and GRANT, JJ.A.

J. B. Allen, for the appellants.

H. H. Davis, K.C., and *C. T. S. Evans*, for the plaintiff, respondent.

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April 15. The judgment of the Court was read by MIDDLETON, J.A.:—Appeal by the defendants from a judgment of Mr. Justice Kelly, bearing date the 6th December, 1929, whereby he awarded to the plaintiffs \$4,582.73, the amount of certain wage-claims assigned to the plaintiffs, against the defendants, directors of William Cane & Sons Company Limited, a company incorporated under the laws of the Province of Ontario, which had been declared bankrupt, and a receiving order made on the 21st January, 1927. The claims for wages due to the employees of the company in no case exceed the wages for one year. The liability of the directors is based on sec. 100 of the Companies Act, R.S.O. 1927, ch. 218.*

The appeal is limited to one point and to one point only. The statutory provision relied upon provides that the directors of a company shall be jointly and severally liable to the labourers, servants and apprentices, for all debts not exceeding one year's wages due for services performed for the company while they are such directors. But, by subsec. 2, a director is not to be liable unless, *inter alia*, the company has, within one year after the debt has become due, "gone into liquidation or has been ordered to be wound up and the claim for such debt has been duly filed and proved." The company has been declared to be bankrupt under the provisions of the Dominion Bankruptcy Act, and the appellants contend that this bankruptcy is not a going into liquidation within the meaning of the Ontario statute. The learned trial Judge was of opinion that going into bankruptcy is properly regarded as going into liquidation within the meaning of the statute, and with this opinion we agree.

*100.—(1) The directors of the company shall be jointly and severally liable to the labourers, servants and apprentices thereof for all debts not exceeding one year's wages due for services performed for the company while they are such directors respectively.

(2) A director shall not be liable under subsection 1 unless,—

(a) the company has been sued for the debt within one year after it has become due and execution has been returned unsatisfied in whole or in part; or

(b) the company has, within that period, gone into liquidation or has been ordered to be wound up and the claim for such debt has been duly filed and proved.

nor unless he is sued for such debt while a director or within one year after he has ceased to be a director.

(3) If execution has so issued the amount recoverable against the director shall be the amount remaining unsatisfied on the execution.

(4) If the claim for such debt has been proved in liquidation or winding-up proceedings a director, upon payment of the debt, shall be entitled to any preference which the creditor paid would have been entitled to, and where a judgment has been recovered he shall be entitled to an assignment of the judgment.

The argument before us turned rather upon a discussion of the question whether the Act should be strictly or liberally construed. It is not, in my view, necessary to enter upon any such discussion. The statute appears to me to be free from difficulty. For the protection of wage-earners the directors of a company are made liable for a year's wages, but, to protect a director from vexatious action on the part of a wage-earner, this liability is not to be enforced unless he is sued while still a director or within one year after he has ceased to be a director; and, secondly, the company, too, must first be sued within one year after the debt became due, and execution must be returned unsatisfied in whole or in part, unless the company has within the same period "gone into liquidation," or has been ordered to be wound up, and the claim in that case must be duly filed and proved.

The term "gone into liquidation" is not anywhere defined; the language is more or less colloquial, for there is not, at the present time, any legal proceeding known as liquidation. At one time there was, but it has long since been obsolete. The technical term used in the Companies Act is "wind-up," although the officer appointed to conduct the winding-up is designated a liquidator.

If one searches dictionaries, it is not hard to find a definition of liquidation wide enough to include bankruptcy. In the Century Dictionary this is given: "Liquidation: the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and apportioning the amount of each partner's or shareholder's profit or loss, etc." In the Oxford Dictionary is the following: "Liquidate: Law and commerce: To ascertain and set out clearly the liabilities of (a company or firm) and to arrange the apportioning of the assets; to wind up." In Corpus Juris, that mine of information, is this definition: "Liquidation, a word of French origin, is not a technical term, and, therefore, can have no fixed legal meaning; but it has a fairly defined legal meaning, and it is said to be a term of jurisprudence, of finance, and of commerce. It is defined as the act of settling, adjusting debts, or ascertaining their amounts or balance due; settlement or adjustment of an unsettled account Applied to a partnership or company, the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and appropriating the amount of profit or loss." All of these definitions are ample to include bankruptcy as carried out under the Dominion statute.

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There are, however, English cases which are very helpful. I refer particularly to *Horsey Estate Ltd. v. Steiger*, [1898] 2 Q.B. 259, [1899] 2 Q.B. 79, and to *Fryer v. Ewart*, [1902] A.C. 187.

In the first of these cases there was a lease with a proviso for re-entry if the lessees, a company, shall enter into liquidation, voluntarily or compulsorily. The company, desiring a re-construction, went into voluntary liquidation, although it was solvent—its desire being to acquire additional capital. The landlord sought to exercise the right of forfeiture, and the company contended that he could not do so because liquidation within the meaning of the lease, in its view, meant a liquidation in the nature of bankruptcy. Mr. Justice Hawkins at the trial, and the Court of Appeal, held that liquidation was a term of wider significance than mere bankruptcy. It unquestionably included bankruptcy, but applied also to winding-up where there was no pretence of insolvency.

In the second case the question also arose upon a lease. The company went into liquidation for the purpose of re-construction and amalgamation—the only way in which, as the law then stood, this desired end could be accomplished. The decision in the earlier case was adopted and approved, and incidentally it was held that this voluntary liquidation was “a condition for forfeiture on the bankruptcy of the lessee” within the Conveyancing and Law of Property Act.

These authorities, I think, are ample to justify a finding that bankruptcy is a going into liquidation within the meaning of the statute in question.

If one seeks to find the probable intention of the Legislature everything points in the same direction. It is far more probable that the Legislature intended in this provision—manifestly for the protection of the directors from vexatious actions—that bankruptcy should be regarded as a “liquidation,” rather than that the legislative intention was that in the event of bankruptcy the directors should escape from liability.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed.

[ORDE, J.A.]

COMMERCIAL MOTOR BODIES AND CARRIAGES LTD. v. PERTH LTD.

1930.

April 15.

Sale of Goods—Bulk Sales Act, R.S.O. 1927, ch. 167, secs. 1(a), 3, 6, 8—Action to Set aside Sale—Whether Brought in Time—Notice to Plaintiff—Knowledge of Solicitor—Action Barred—Status of Plaintiff as Creditor—Absence of Direct Relationship—Claim Arising out of Tort not Passed into Judgment.

The defendant P. company, being engaged in the retail business of selling parts used in the upkeep and repair of motor-trucks, by agreement between it and the defendant R. company, dated the 9th September, 1927, sold to the latter about 80 per cent. of the quantity of goods then in stock:—

Held, that the sale was a bulk sale within the meaning of sec. 6 of the Bulk Sales Act, R.S.O. 1927, ch. 167, because it was made out of the ordinary course of business and because it comprised substantially the vendor's entire stock-in-trade; and, as the requirements of the Act were not complied with, the sale would, if properly attacked, be void under sec. 3.

This action was brought on the 17th April, 1928, by an alleged creditor of the P. company, on behalf of all creditors, to set aside the sale, but that was not within 60 days from the date of the sale. It was contended that it was brought within 60 days from the date when the plaintiff first received notice of it (sec. 8):—

Held, that certain information obtained by one of the solicitors for the plaintiff on the 16th February, 1928, constituted notice of the sale; that notice to the solicitor was notice to the plaintiff; and the action, being one day late, was barred by sec. 8.

Notice under sec. 8 means "knowledge."

Held, also, that the plaintiff was not a creditor of the P. company on the 9th September, 1927, and was not in a position to attack the sale: secs. 1(a) and 3 of the Act.

The plaintiff was never a creditor of the P. company as the result of any contractual relationship between them; and the term "creditor" cannot be extended so as to include persons who have contingent claims arising out of torts or transactions of a tortious character until the relationship has become really that of debtor and creditor by virtue of a judgment.

ACTION to set aside a sale of chattels made in the circumstances set out below.

April 3. The action was tried before ORDE, J.A., without a jury, at a Toronto sittings.

J. F. Boland, for the plaintiff.

D. L. McCarthy, K.C., for the defendant Diamond "T" (Montreal) Ltd.

No one appeared for the defendant Perth Ltd., the pleadings having been closed against it.

April 15. ORDE, J.A.:—This action is brought by the plaintiff, on behalf of itself and all other creditors of the defendant Perth Ltd., to set aside a sale of certain chattels by the defendant

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Perth Ltd. to the defendant Diamond "T" (Montreal) Ltd., known at the time of the sale as Ruggles (Montreal) Ltd., as being fraudulent and void as against the creditors of Perth Ltd., under the provisions of the Bulk Sales Act, R.S.O. 1927, ch. 167.

The statement of claim also alleged that the sale was made for the purpose of hindering, defeating, and delaying the creditors of Perth Ltd., and was fraudulent and void under the Statute of Elizabeth, now the Fraudulent Conveyances Act, R.S.O. 1927, ch. 134; but no evidence was given upon this branch of the case and the point was not pressed.

Perth Ltd. was engaged in the business of selling parts used in the upkeep and repair of Ruggles motor-trucks, the business being essentially a retail one, to garage proprietors, repair-shops, and others requiring new or spare parts for their machines. The sale in question was made by an agreement between Perth Ltd. and Ruggles (Montreal) Ltd., dated the 9th September, 1927. It covered a large quantity of parts for Ruggles trucks, the price being \$12,500. The quantity comprised about 80 per cent. of the quantity then in stock and made up when shipped by freight about a car-load.

There can be no doubt that the sale was a bulk sale within the meaning of sec. 6 of the Act, both because it was made out of the usual course of business of the vendor and because it comprised substantially the vendor's entire stock-in-trade; and, as the requirements of the Act were not complied with, the sale would, if properly attacked, be clearly void under sec. 3.

The defendant Perth Ltd. was not represented at the trial, having failed to deliver a statement of defence and the pleadings being closed as to it. The defendant Diamond "T" Ltd., by which name the purchasing company is now known, raises several defences.

The first one is that the action is barred under sec. 8 of the Bulk Sales Act, which is as follows:—

"8. No action shall be brought or proceedings had or taken to set aside or have declared void any sale in bulk for failure to comply with the provisions of this Act, unless such action is brought within 60 days from the date of said sale or within 60 days from the date when the creditor attacking such sale first received notice thereof."

The writ in this action was issued on the 17th April, 1928, long after 60 days from the date of the sale had expired. But the plaintiff says it was within 60 days from the date when it "first received notice" of the sale, and the only question to be determined upon this point is whether or not certain information

obtained by Mr. W. J. Boland, one of the solicitors for the plaintiff company, on the 16th February, 1928, constituted notice of the sale. If it did, then the action was one day late.

Mr. Boland had been acting as solicitor for the plaintiff company, which, as he put it, belonged to an estate which he had been administering. An action had been brought by the plaintiff company against Canadian Ruggles Ltd. and the defendant Perth Ltd. to set aside a sale by Canadian Ruggles Ltd. to Perth Ltd. as fraudulent and void under the Bulk Sales Act. That action had been tried before Mr. Justice Wright, and by his judgment of the 27th February, 1928, that sale was set aside. It is by virtue of that judgment that the plaintiff claims to be a creditor of Perth Ltd. in this action. The bearing of that judgment upon the plaintiff's status as a creditor in this action will be discussed later.

Mr. Boland says that the first information he received as to the sale by Perth Ltd. to Ruggles (Montreal) Ltd. was from the solicitor for Perth Ltd., whom he met in the street and from whom he coaxed the information. What he then learned is substantially embodied in a letter which Mr. Boland wrote in his firm's name to Ruggles (Montreal) Ltd. on the 16th February, 1928. In that letter he describes the plaintiff as "creditors of Perth Ltd." The letter states, among other things, that "we are now advised for the first time that Perth Ltd. sold or pretended to sell to your company parts of the value of \$24,000 for about \$12,000. . . . We are further advised that \$5,000 in cash was paid and that notes are now outstanding representing the balance of the purchase-money aggregating \$7,000. These notes, we understand . . . are repayable in instalments at the rate of \$250 per month." The letter then goes on to say that the sale was contrary to the Bulk Sales Act and was illegal, and threatens immediate action unless restitution is made and the balance of the money is paid to the creditors of Perth Ltd.

Some days later, a representative of Ruggles (Montreal) Ltd. saw Mr. Boland, and there was also some further correspondence between Mr. Boland and Mr. Chenevert, the Ruggles company's solicitor in Montreal. On the 16th April, 1928, Mr. Boland wrote to Mr. Chenevert, pointing out that the threatened action must be commenced within 60 days, and enclosed a form to be signed by Ruggles (Montreal) Ltd. agreeing not to raise any defence as to time if the action should not be commenced within the 60 days.

Later in the same day, Mr. Boland wrote to Mr. Chenevert a second letter stating that since dictating the earlier letter he found that "to-morrow is the last day for issuing a writ," and he asked

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Mr. Chenevert to telegraph him if the waiver was executed. No telegram arriving the next day, that is the 17th April, 1928, the writ was issued.

In making his calculations, Mr. Boland unfortunately overlooked the fact that the year 1928 was leap year and that February had had 29 days; so that, excluding the 16th February, 1928, from the calculation, the 16th April, 1928, was the sixtieth day thereafter, and was the last day for the issue of the writ, and the next day was too late.

Notwithstanding this, and the fact that from his correspondence Mr. Boland himself considered that the plaintiff company had received notice of the sale on the 16th February, 1928, it is seriously argued that the information then obtained did not constitute notice, first because it did not come from any authentic source, and until verified ought to be treated as mere rumour which might prove to be unfounded, and second because notice to Mr. Boland as the plaintiff's solicitor was not necessarily notice to the plaintiff company.

Those two objections may be disposed of shortly. Notice under sec. 8 of the Act means "knowledge." It cannot in the nature of things require notice in the sense of some formal notification required to be given by one person to another. It is not necessary to attempt to define the line between mere rumour, which might be baseless, and such knowledge as would constitute "notice" under this section. This was not mere rumour, and Mr. Boland did not treat it as such. The information came from the solicitor of the vendor. As set forth in the letter of the 16th February, 1928, it is exceedingly accurate and corresponds closely with the terms of the agreement. Mr. Boland nowhere asks if what he has heard is true or not. He treats the information as authentic and threatens suit if the creditors' claims are not settled. To all this must be added the fact that Mr. Boland had himself fixed the 16th February, 1928, as the date from which time began to run against the plaintiff.

As to the other objection to this ground of defence, this is not the case of some casual information coming to a solicitor at a time when he is under no duty to receive it or to disclose it to his client. Mr. Boland was not only in effect administering the affairs of the plaintiff company, but was at the time acting for it in an action which forms the basis of its claim to act as a creditor in this action, and made the inquiry of the Perth company's solicitor during the pendency of that action. That inquiry was made on behalf of the plaintiff company. If the knowledge, so obtained by the plaintiff's solicitor, is not to be imputed to the plaintiff,

what authority had Mr. Boland for writing the letter of the 16th February, 1928, on its behalf? It is too clear for argument that whatever knowledge Mr. Boland received on that date affected the plaintiff and that it is bound by it.

In my judgment, it is clear that the plaintiff company received notice of the bulk sale on the 16th February, 1928, and that, as the writ did not issue until 60 days had elapsed thereafter, the action is barred under sec. 8.

I might perhaps go no further and dismiss the action upon that ground alone, but the defendant raises another point which deserves consideration, namely, that the plaintiff was not at the time of the bulk sale a creditor of Perth Ltd. and so has no status in this action.

The plaintiff was never a creditor of Perth Ltd. as the result of any contractual or other relationship between them. Its right to be deemed a creditor at all was dependent upon the result of its attack upon the alleged fraudulent bulk sale by Canadian Ruggles Ltd. to Perth Ltd. That action was commenced on the 2nd September, 1927, so that it was pending when the agreement between Perth Ltd. and Ruggles (Montreal) Ltd., which is attacked in this action, was made, namely, the 9th September, 1927. But there was not at that date any cause of action as between the plaintiff and Perth Ltd. which could be the foundation for a judgment for the recovery of money by the plaintiff from Perth Ltd. The only debtor to the plaintiff was Canadian Ruggles Ltd. The mere declaration by the Court in that action that the bulk sale was invalid could not of itself have made the plaintiff a creditor of Perth Ltd., and the only foundation for any personal recovery by the plaintiff against Perth Ltd. which is embodied in the judgment of the 27th February, 1928, is that, being unable to redeliver the goods to the fraudulent vendor so that they might be available for the vendor's creditors, Perth Ltd. is made liable by the terms of the judgment to account for the proceeds, and judgment is given in favour of the plaintiff and the other creditors of Canadian Ruggles Ltd. (other than Perth Ltd.) against Perth Ltd. for the amount found due by the Master.

How far a judgment in those terms, not yet implemented by a report from the Master in which the amount due the plaintiff would be exactly defined, would constitute the plaintiff a creditor of Perth Ltd., if the judgment had preceded the sale of the 9th September, 1927, might be a nice question.

"Creditor" is defined by para. (a) of sec. 1 of the Bulk Sales Act, and includes "a person to whom the owner of any stock as defined by the Act is indebted, whether the debt is due and owing

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or not yet payable." This of course gets rid of any difficulty as to a debt owing but not yet enforceable, *debitum in presenti, solvendum in futuro*. But it must be a debt—something owing. Were it not so, the scheme of the Act could hardly be workable, for the vendor must furnish the purchaser with a statement of all his creditors. And, while the Act includes among creditors sureties and endorsers of notes and bills of exchange who upon payment would stand in the shoes of the direct creditor, I do not think that the term can be extended to contingent claims arising out of torts or of transactions of a tortious character until the relationship has become really that of debtor and creditor by virtue of some judgment.

The right to attack a bulk sale as fraudulent is given by sec. 3 of the Act to creditors only. It has been established that one who has a claim for damages merely is not a creditor entitled to attack a fraudulent or preferential conveyance under the Ontario Assignments and Preferences Act: *Ashley v. Brown* (1890), 17 A.R. 500; *Gurofski v. Harris* (1896), 27 O.R. 201, 23 A.R. 717; Middleton, J., in *Hopkinson v. Westerman* (1919), 45 O.L.R. 208, at p. 214. Those decisions are clearly applicable to the Bulk Sales Act, and if a cause of action founded on tort and not yet passed into a judgment confers no status as a creditor, *à fortiori* a cause of action to set aside some other transaction as fraudulent in which the only foundation for any money recovery arises, not because of any original cause of action against the so-called debtor, but merely as an alternative form of relief because the goods which are the subject of the action cannot be followed, cannot constitute the person a creditor.

In my opinion the plaintiff was not a creditor of Perth Ltd. in any sense whatever on the 9th September, 1927, when the agreement for sale between the two defendants was made, and it is not entitled to attack the sale under the Act.

A third point made by Mr. McCarthy was as to the regularity of the writ and concurrent writ issued in this action, the defendant Diamond "T" Montreal Ltd. having entered a conditional appearance. This was a somewhat involved and complicated point, which, in view of my ruling upon the two other grounds of defence, need not be dealt with.

The action must be dismissed with costs.

[RANEY, J.]

MCWHIRTER V. CREBER.

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April 22.

Partnership—Dissolution—Liability of Retiring Partner upon Promissory Note—Release from—Partnership Act, secs. 6, 7, 8, 18(2), (3)—Bankruptcy of Continuing Partner—Course of Dealing—Inference of New Contract—Acceptance of Continuing Partner as Sole Debtor—Implication of Agreement—Onus—Intention—Proving Claim in Bankruptcy Proceedings.

At the date of the dissolution (April, 1926) of a business partnership, composed of two brothers, the plaintiff held the promissory note of the firm for \$2,000, for money lent. Each partner carried on business separately after the dissolution. The partner F. became insolvent in April, 1928. The plaintiff sued the other partner (G.) for the \$2,000. G. denied that the money was lent to the partnership; but the evidence established that at least \$1,000 of the plaintiff's advances went into the firm's bank-account, that the plaintiff was given the firm's promissory notes for each advance when made, and that all payments of interest to her from time to time on the full amount of her advances were made out of the firm's bank-account:—*Held*, applying secs. 6, 7, and 8 of the Partnership Act, R.S.O. 1927, ch. 170, that at the date of the dissolution both brothers were liable to the plaintiff on the \$2,000 note.

The plaintiff knew of the dissolution of the partnership, and thereafter advanced \$500 to F., surrendering the firm's \$2,000 note and taking from F. his note, signed in the firm name, for \$2,500; and when that fell due she advanced another \$500, so that at the time of F.'s insolvency she held F.'s note, signed in the firm name, for \$3,000. Interest had been paid by F. on the whole indebtedness down to December, 1927—19 months after the dissolution. The plaintiff did not sue for the \$1,000 advanced to F. after the dissolution.

G. pleaded that, if the plaintiff's money was lent to the partnership, the plaintiff, after the 1st May, 1926, accepted F. as sole debtor and released G.:—

Held, following *Royal Bank of Canada v. Hogg* (1929), 64 O.L.R. 633, that the taking of the renewal note, the original being retained by the plaintiff, did not discharge the indebtedness represented by the original, but merely suspended the right of action thereon during the currency of the renewal.

Held, also, that the agreement required by sec. 18(3) of the Partnership Act in order to release a partner must be an agreement between the creditor and each of the two partners—an agreement between any two of them would not be enough. No express agreement was suggested by any one of the three when giving evidence at the trial; and the course of dealing between the plaintiff and F. after the dissolution was not sufficient to raise the inference of a contract to which all three were parties.

It is not the duty of the creditor to seek out the debtor—in law the borrower is the servant of the lender. When the firm became dissolved, it was the duty of G. to ascertain who the creditors of the partnership were.

By the statute, the onus of proving an intention on the part of the plaintiff to discharge G. was upon G., and he had not satisfied the onus.

The plaintiff, by proving her claim upon the note against the estate of F. in the bankruptcy proceedings, did not release G.

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AN action against Frank Creber and George Creber upon a promissory note for \$2,000 made by the defendants in favour of the plaintiff.

The action was tried before RANEY, J., without a jury at a Toronto sittings.

The Hon. E. B. Ryckman, K.C., and *Baird Ryckman*, for the plaintiff.

G. T. Walsh, K.C., for the defendant George Creber.

The action was discontinued as against the defendant Frank Creber.

April 22. RANEY, J.:—The defendants were in business as partners under articles of partnership made in May, 1917. The firm name was Creber Brothers, and the business was the manufacture and sale of marble monuments. Frank Creber was the office-man, and George Creber the shop-man.

The plaintiff's husband was employed by the partnership for a number of years, down to its dissolution in the spring of 1926. Between December, 1923, and the dissolution, the plaintiff lent the firm \$2,000, in four cheques of \$500 each, made respectively in December, 1923, December, 1924, April, 1925, and December, 1925. The first three of these cheques were made in favour of Frank Creber and the fourth in favour of Creber Brothers. The first and the third cheques went into the firm's bank-account, the second and fourth cheques were appropriated by Frank Creber to his own use to reimburse him, as he claimed at the trial, for moneys that he had advanced to the firm. In the case of all four cheques, promissory notes were made in favour of the plaintiff, and signed by Frank Creber in the firm's name.

At some stage the practice was inaugurated of adding the new principal to the old and giving one note for the total, so that at the date of the dissolution of the partnership the plaintiff held the promissory note of the firm for \$2,000. Interest on the plaintiff's notes was paid from time to time by the cheques of the partnership.

After the dissolution of the partnership, Frank Creber carried on the manufacturing side of the business on the same premises, under the old firm name of Creber Brothers, registering himself under the provisions of the Limited Partnership Act as sole owner of the business from the 12th April, 1926. George continued the retail side of the business under his own name on other premises.

Frank Creber became insolvent in April, 1928.

In June, 1926, after the dissolution, the plaintiff made an advance of \$500 to Frank Creber, surrendering the firm's \$2,000 note, and taking from him his note, signed Creber Brothers, for \$2,500. When the \$2,500 fell due, the plaintiff advanced another \$500; so that at the time of Frank Creber's insolvency the plaintiff held Frank Creber's note, signed Creber Brothers, for \$3,000. Interest had been paid by Frank Creber after the dissolution on the whole indebtedness down to December, 1927—that is to say, for 19 months after the dissolution.

The plaintiff is not claiming for the \$1,000 advanced to Frank Creber after the dissolution.

In his pleadings George Creber denies that the plaintiff lent the \$2,000 to the partnership of which he was a member, and in his evidence at the trial he said that he had not heard of the plaintiff's claim against the partnership until a couple of months before his brother's insolvency; but, as I have said, the evidence establishes that at least \$1,000 of the plaintiff's advances to the partnership went into its bank-account, that the plaintiff was given the firm's promissory notes, and that all payments of interest to her from time to time on the full amount of her advances were made out of the firm's bank-account. If George Creber did not know these facts, he might and ought to have known them.

Applying secs. 6, 7, and 8 of the Partnership Act, R.S.O. 1927, ch. 170, there can, I think, be no doubt that at the date of the dissolution of the partnership both brothers were liable to the plaintiff on her \$2,000 note.

The second and serious line of defence of the defendant George Creber is that, if the plaintiff's money was lent to the partnership, "the plaintiff, after the 1st day of May, 1926, accepted Frank Creber as sole debtor and released George Creber from all liability for the said debt."

There is no doubt that the plaintiff knew of the dissolution of the partnership at the time in 1926 when she delivered up the partnership note for \$2,000 to Frank Creber and accepted the renewal note for \$2,500.

Apart from the surrender of the note, the general principle is stated, in the very recent case of *Royal Bank of Canada v. Hogg* (1929), 64 O.L.R. 633, at p. 656, to be that "the taking of a renewal note, where the original note is retained by the holder, does not of itself discharge the indebtedness represented by the original note, but merely suspends the right of action thereon during the currency of the renewal." What, then, was the effect of the surrender of the \$2,000 note?

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The law is stated in the Ontario Partnership Act of 1920 (now R.S.O. 1927, ch. 170), by which this Province adopted the codification of the law of partnership as contained in the English Partnership Act of 1890. Section 18(2) and (3) of our Act is a reproduction of section 17(2) and (3) of the English Act, and reads as follows:—

“(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

“(3) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.”

In *Cluff v. Norris* (1909), 19 O.L.R. 457, a Divisional Court held that the effect of the decisions of the English Courts was stated in sec. 17(3) of the English Act, and that it was necessary to make out a case of novation in order to discharge the retired partner.

In the earlier case of *Bresse v. Griffith* (1894), 24 O.R. 492, a Divisional Court had held that where the only evidence that the plaintiffs had agreed to discharge the retired partner and to look to the remaining partner alone was the fact that the plaintiff had rendered an account for the goods for the price of which he was suing along with other goods, for which the remaining partner alone was liable, to the remaining partner, and afterwards had accepted promissory notes for the amount, signed in the firm name, with the knowledge that the firm was then composed of the remaining partner only — this evidence was insufficient to establish an agreement to look to the remaining partner alone; “for the facts are quite consistent with an intention on the plaintiffs’ part . . . to look to both defendants . . . in case the notes should not be paid at maturity” (pp. 495, 496).

In the present case, the agreement required by sec. 18(3) of our Act would have to be an agreement between the plaintiff and the two defendants, Frank Creber and George Creber—an agreement between two of them would not be enough. All three of the parties to the situation as it existed at the time of the dissolution—the plaintiff, Frank Creber, and George Creber—were called as witnesses at the trial. No express agreement was suggested by any one of the three.

If, after the dissolution of the partnership, the plaintiff had gone to George Creber and asked him about payment of her \$2,000

note, and if he had answered that his brother Frank was taking over the assets and assuming the liabilities (which was the fact according to the agreement of dissolution, but of which the plaintiff was ignorant), and if the plaintiff had then gone to Frank Creber and surrendered her note and taken a new note from him, there would have been a strong argument that what had happened between the plaintiff and the two brothers raised an implication of an agreement within the meaning of the section. The facts would have suggested an understanding between the plaintiff and the Crebers that the plaintiff would look to Frank Creber for payment.

The popular conception is that it is the duty of the creditor to search out the debtor. That, of course, is not true in law. In law the borrower is the servant of the lender.

When the firm of Creber Brothers was dissolved in the spring of 1926, it became the duty of George Creber to ascertain who the creditors of the partnership were. Having ascertained who the firm's creditors were, he might then have insisted upon payment of their claims out of the partnership assets, or, as an alternative, upon an agreement on their part to look to Frank Creber for payment, or failing payment or such an agreement, then upon a liquidation of the partnership.

The courts, before the codification, and Parliament in adopting the law as laid down by the courts, did not content themselves with providing that "a course of dealing" between the creditor and the continuing partner might raise an implication of an election to release the retiring partner; it went much further than that when it required that there must be either evidence of an actual contract between all the parties interested, or of facts from which a contract between the members of the partnership and the creditor might be implied. And the court ought to be more cautious in its implication in a case like this, where the plaintiff is the wife of a labourer whose husband stood in the relation of employee to the partnership, than it would be if the plaintiff were, for instance, an experienced and independent business man. There is, moreover, the difficulty of drawing an implication of a contract between the plaintiff and George Creber that the plaintiff would look to Frank Creber for payment of the partnership indebtedness, when the fact was that George Creber did not even know that the plaintiff was a creditor of the partnership.

After reviewing the English cases both before and since the codification of 1890, in which it has been held on the one hand (and having regard, of course, in each case to the facts put in evidence in that case) (a) that a retired partner has not been dis-

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charged, and (b) that a retired partner has been discharged, the learned author of Lindley on the Law of Partnership, 9th ed. (1924), makes, at p. 325 *et seq.*, a summary of the effect of the cases. So far as it has a bearing on this case, the summary may be further summarised as follows: An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him of his rights against the old firm, either at law or in equity; but the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment; the court will consider the whole case and will infer a discharge if, upon the whole, justice to all parties so requires; but the small number of cases in which relief against the estate of a late partner has been refused, compared with those in which it has been granted, shews that the leaning of the Court is strongly in favour of the creditor.

Under the circumstances, I am not able to find that "the course of dealing" between the plaintiff and Frank Creber, after the dissolution, was sufficient to raise the inference of a contract between the three principals to the transaction. The language of the statute puts the onus on George Creber of proving an intention on the part of the plaintiff to discharge him from liability on the partnership note held by the plaintiff at the date of dissolution of the partnership—such an intention being evidenced by facts from which the Court will imply a contract between the plaintiff and George and Frank Creber to give effect to the intention—and in my opinion he has not satisfied the onus.

Finally the defendant George Creber pleads that by proving for her claim against the estate of Frank Creber in the bankruptcy proceedings the plaintiff released him. There is nothing in the statute to support that plea, and the cases are against it.

There will be judgment against George Creber for \$2,000, with interest since December, 1927, and the costs of the action.

[MIDDLETON, J.A.]

NATIONAL SANITARIUM ASSOCIATION v. TOWN OF BRACEBRIDGE.

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April 23.

Municipal Corporation—Liability of, for Maintenance of Consumptive Patients in Sanatoria—Sanatoria for Consumptives Act—Hospitals and Charitable Institutions Act—Legislative Intention—Implied Repeal of Statutory Provision—Towns and Villages in Unorganised Districts.

The amendment made to the Hospitals and Charitable Institutions Act in 1926 by 16 Geo. V. ch. 73, whereby the liability for the maintenance in a hospital of an indigent patient was cast upon the county, city, or separated town in which he was resident at the time of his admission to the hospital, is to be regarded as the last expression of legislative intention and must prevail. It operates as an implied repeal of the inconsistent provision, sec. 16(2) of the Sanatoria for Consumptives Act. See R.S.O. 1927, ch. 357, sec. 15 (2), and R.S.O. 1927, ch. 359, sec. 21.

An action brought by a sanatorium association against the corporation of a town, but not a separated town, in an unorganised district, to recover the amount due for the maintenance of a patient in the sanatorium from the 1st January, 1927, to the present time, the patient having been resident in the town at the time of his admission to the institution, was dismissed.

AN application by the plaintiff association for judgment upon admitted facts.

February 12. The application was heard by MIDDLETON, J.A., in the Weekly Court, Toronto.

J. M. Godfrey, K.C., for the plaintiff association.

W. A. Boys, K.C., for the defendant municipality.

April 23. MIDDLETON, J.A.:—The question raised is one of great importance to the defendants and to all sanatoria and municipalities in the unorganised districts.

Under the Revised Statutes of 1914, sanatoria for consumptives were governed by ch. 298. This statute contained two provisions as to the maintenance of indigent persons: first, sec. 16(2), which provided for payment by the municipality in which an indigent patient was resident at the time of his admission; and, secondly, by sec. 23, the Hospitals and Charitable Institutions Act, R.S.O. 1914, ch. 300, sec. 23, was also made applicable.

This section imposes a liability upon the municipality in which the indigent patient is resident at the time of his admission in substantially the same terms as the section first named. It also contains important ancillary provisions which need not be here discussed.

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This provision gave rise to much complaint, particularly on the part of smaller municipalities. The burden cast upon them was sometimes found to be very onerous. It was particularly complained of by the small towns and villages situate in the northern unorganised districts. Many of the sanatoria were located in these districts, as the climatic conditions were rightly regarded as extremely favourable. The result was that many afflicted by or fearing tuberculosis took up residence in these northern towns and were ultimately admitted to the sanatoria. As they had acquired a local residence, these small municipalities found themselves heavily burdened.

Another grievance arose from the fact that those admitted to the sanatoria from other parts of Ontario were sometimes discharged as cured or improved. These sometimes became resident in the northern towns, but afterwards had a relapse and re-entered the sanatorium, having acquired a new residence, and so increased the burden cast upon these towns by reason of their salubrity.

This complaint was followed by an amendment of the Hospitals and Charitable Institutions Act by (1926) 16 Geo. V. ch. 73. By this amending Act, sec. 23 of the Hospitals and Charitable Institutions Act was repealed and a new section enacted. By this the liability for the maintenance of the indigent patient was cast upon the county, city, or separated town in which he was resident at the time of his admission. The statute was further amended (sec. 23(3)) by defining residence for the purpose of this section as meaning actual residence within the county, city, or separated town for the period of 3 months within the 5 months next prior to the admission to the hospital, and by further providing (sec. 23(4)) that residence shall not be deemed to have been changed or to have ceased by reason of the person having gone from one municipality to another for the purpose of seeking medical advice or treatment or seeking admission to any hospital—the period during which this occurred not counting in the computation of time under the earlier provision. The change now of importance is the substitution of counties, cities, and separated towns for the old provision “any municipality.”

This amendment is carried into the Revised Statutes of 1927, ch. 357, and at the same time the reference in the Sanatoria Act to the provisions of the Hospitals and Charitable Institutions Act is continued. Section 16(2) of the Sanatoria Act, not being expressly repealed, is also carried forward, being renumbered as sec. 15(2) of ch. 357. The amended sec. 23 of the Hospitals and Charitable Institutions Act is found in ch. 359 as sec. 21.

A patient resident at the time of his admission in Bracebridge, a town but not a separated town, situate in the district of Muskoka, has been maintained in the plaintiff institution from the 1st January, 1927, until the present time. There is due for his maintenance up to the date of the writ \$1,171.50, and this action is brought to recover this amount.

The defendant town corporation contends that the statute which governs this case is the present Revised Statute respecting Hospitals, which is made applicable to sanatoria; that sec. 16(2) of the Sanatoria Act of 1914 must be taken to have been impliedly repealed by the legislation of 1926; and that its survival in the revision of 1927 was *per incuriam* and so of no effect.

The plaintiff association on the other hand contends that the Legislature intended the amendment of 1926 to apply to hospitals only, and not to sanatoria, that the provisions of sec. 16(2) were intentionally left intact, and that the retention of sec. 23 of the Hospitals and Charitable Institutions Act in the enumeration of clauses in that Act made applicable to sanatoria was *per incuriam*.

I have come to the conclusion that the amendment of 1926 must be regarded as the last expression of legislative intention and must prevail, and that it operates as an implied repeal of the inconsistent provision of sec. 16(2)—15(2) in the Revision. I am aided in this by the feeling that the Legislature is not likely to have intended to relieve towns and villages in counties and to have left the full burden upon small and often poor towns and villages in the unorganised districts, particularly when these are faced with a far greater share of tuberculous residents who migrate there from the older portions of the Province.

If this does not commend itself to the Legislature as an accurate exposition of its legislative intention, the remedy is easy, and in the meantime no serious harm is done.

The action will, therefore, be dismissed with costs.

[Reversed by the Second Divisional Court, on the 20th June, 1930.]

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RE KOLODZI AND DETROIT AND WINDSOR SUBWAY CO.

April 25.

Expropriation—Powers of Tunnel Company Incorporated by 17 Geo. V. ch. 83 (Dom.)—Secs. 12 (a), 15 (a), 21—Railway Act, 9 & 10 Geo. V. ch. 68, sec. 2 (15) (Dom.)—Taking of Parallelopipedon beneath Surface—Compensation—Award—Appeal—Ground not Taken in Notice—Rule 491 (2).

A company incorporated by a Dominion statute, 17 Geo. V. ch. 83, for the purpose of constructing a tunnel under a river, was authorised by sec. 15 (a) to expropriate any lands actually required for the construction, maintenance, and operation of the subways or tunnels authorised by the Act, or to expropriate an easement in, over, under or through such lands, without the necessity of acquiring a title in fee simple thereto. By sec. 21, the Railway Act, 1919, was made applicable to the company and its works and undertakings. The company served upon the owners of land through which the tunnel was to be constructed notice of taking a part of their lands, describing the part as "of a uniform depth or thickness of 33 feet 6 inches measured vertically, the upper face of which is 38 feet 10 inches below the top of the sidewalk at the south limit of S-street and rises with a uniform grade of 3.97 per cent. going southerly from S-street," i.e., the company desired to expropriate a parallelopipedon beneath the surface; and an award of compensation was made upon that basis:—

Held, upon appeal from the award, that what the company desired to take was not a mere easement, but a hereditament (sec. 2 (15) of the Railway Act, 1919).

And *held* (RIDDELL, J.A., dissenting), that the company had power under its Act of incorporation to do so.

Farmer v. Waterloo and City Railway Co., [1895] 1 Ch. 527, distinguished.

Held, also, that the question whether the company had power to expropriate the part or "core" described was not properly before the Court, the point not having been raised in the arbitration proceedings nor in the notice of appeal.

Per RIDDELL, J.A.:—The statute does not give the company power to take a section out of a freehold—it is bound to take the freehold *ab centro usque ad cælum*: *Metropolitan Railway Co. v. Fowler*, [1893] A.C. 416.

AN appeal by Stephen Kolodzi and Lottie Kolodzi, the claimants, from an award of COUGHLIN, Co.C.J., as arbitrator, awarding to them \$5,160 as compensation for the expropriation of certain lands in the city of Windsor, for the purpose of constructing a subway or tunnel, and for damage to buildings, the appellants alleging that the amount awarded was too small.

February 24. The appeal was heard by RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

R. S. Robertson, K.C., and *W. D. Roach*, for the appellants. The notice of expropriation is insufficient because it refers only to a section of the appellants' lands 38 feet below the surface.

The Act under which the respondent company operates does not provide for this: Detroit and Windsor Subway Company Act, 17 Geo. V. ch. 83 (Dom.), secs. 12 and 15. The company must compensate for the strip of land taken, up to and including the surface and the buildings on the surface. The owners should not be forced to take chances as to whether or not the buildings on the surface will be disturbed. Furthermore, if disturbance does take place, no further claim can be made for such damage. Therefore the compensation should be based on the value of the land both above and below the actual path of the tunnel. Reference to *Farmer v. Waterloo and City Railway Co.*, [1895] 1 Ch. 527; *Ramsden v. Manchester South Junction and Altrincham Railway Co.* (1848), 1 Ex. 723; *Sparrow v. Oxford etc. Railway Co.* (1852), 2 DeG. M. & G. 94, at p. 109; *Re Dunn and City of Stratford* (1905), 5 O.W.R. 65; *Uttley v. Todmorden Local Board of Health* (1874), 44 L.J.P.C. 19, at p. 23.

J. B. Aylesworth, for the company, respondent. The notice of expropriation is sufficient, as power to take only what has been taken is given under secs. 12 and 15 of the Act. The word "easement" in the Act gives the company a wider power than is usually given, otherwise the word has no effect.

April 25. *MASTEN, J.A.*:—This is an appeal from the award of Judge Coughlin, Judge of the County Court of the County of Essex, sitting as an arbitrator, whereby he awarded to the claimants the sum of \$5,160 as compensation for the expropriation of certain lands in the city of Windsor and for damage to buildings.

The respondent, hereinafter called "the tunnel company," is a corporation incorporated by special Act of the Parliament of Canada, for the construction of a tunnel under the river between Windsor and Detroit. The appellants are the owners of lands and buildings on the Windsor side of the river, and the respondent's tunnel passes under their property. The notice of expropriation is dated the 27th May, 1929, and was personally served upon the appellants.

The lands to be taken are therein described as follows:—

"All and singular that certain parcel or tract of land and premises situate lying and being in the city of Windsor in the county of Essex and Province of Ontario and being composed of part of lot number 4 according to registered plan number 91. The part to be taken is of a uniform depth or thickness of 33 feet 6 inches measured vertically the upper face of which is 38 feet 10 inches below the top of the sidewalk at the south limit of Sandwich-street and rises with a uniform grade of 3.97 per cent. going

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1930. above-described property at the surface of the ground may be
described as follows:—

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Masten, J.A. “Commencing at the intersection of the southerly limit of
Sandwich-street with the limit between lots numbers 4 and 5
according to registered plan number 91 thence westerly following
the southerly limit of Sandwich-street 22 feet thence southerly
parallel with the easterly limit of the said lot number 4 107 feet
more or less to the northerly limit of an alley in the rear of said
lot thence easterly following the northerly limit of the said alley
13 feet 2 inches thence on a course north 15 degrees 59 minutes
58 seconds west astronomic 55 feet 8 inches more or less to the limit
between lots numbers 4 and 5 thence northerly following the said
limit between lots 4 and 5 50 feet 4 inches more or less to the
place of beginning containing by admeasurement 2,101 square
feet be the same more or less.”

Thereafter proceedings were duly taken before his Honour
Judge Coughlin, who, on the 5th September, 1929, made his award
fixing the damage to the buildings of the appellants at the sum of
\$3,400 and for the taking of the lands the sum of \$1,760, making
together the sum of \$5,160, and he awarded to the appellants the
costs of the arbitration.

The appellants served notice of appeal from the award, their
notice being dated the 13th September, 1929, and in their notice
set forth their grounds of appeal as follows:—

“1. That the learned Judge, as arbitrator, erred in finding
that the value of the claimants’ land would be depreciated by reason
of the easement in favour of the respondent by only 10 per cent. of
the value of the land, exclusive of the building.

“2. That the amount awarded by the learned Judge, as
arbitrator, for damages for depreciation by reason of the presence
of the easement as aforesaid is an arbitrary sum not supported by
the evidence, and that, upon the evidence, the learned arbitrator
should have found that such depreciation will be greatly in excess
of the amount awarded.

“3. That the learned Judge, as arbitrator, having found as a
fact that there is a likelihood that the construction of the tunnel
by the respondent through the claimants’ land below the building
thereon will cause some damage, and that there is a possibility of
substantial damage to the building being caused thereby, erred in
concluding, as a result of such finding, that the damage to the
claimants by reason thereof is only 20 per cent. of the value of the
building, and that, having made that finding of fact, he should

have awarded the claimants a sum approximately the total value of the building.

"4. And upon such further grounds as may be alleged by counsel on the hearing of the appeal."

On the argument before us the grounds of appeal mentioned in the notice, while not specifically abandoned, were not pressed, and I see no ground upon which the quantum of the allowance could be effectively attacked. The reasons of the arbitrator appear to me to be entirely satisfactory, and the evidence not such as to warrant any disturbance in respect of quantum; but Mr. Robertson, counsel for the appellants, argued that the special Act under which the respondent derives its power of expropriation does not permit it to expropriate the underground tunnel as such, but that it is bound to take the whole of the lands from the centre of the earth to the sky, and consequently that the proceedings were defective *ab initio* and the award wholly invalid.

This ground of appeal was not at all mentioned in the notice of appeal and was brought forward for the first time in oral argument. It took the respondent by surprise and leave was given him by the Court to file a written argument on that point, which has since been done.

The power of the respondent company to expropriate appears in the special Act by which the company is incorporated, being ch. 83 of the Dominion statutes of 1926-1927, 17 Geo. V., and the sections of that Act which are relevant to the questions here under consideration are 12(a), 15(a), and 21.

By 12(a) the company is empowered to "lay out, construct, complete, maintain, work, manage and use subways or tunnels under the Detroit river, for vehicular, pedestrian, railway and other purposes, with the necessary approaches from convenient points on the Canadian side in or near the city of Windsor," etc.

By sec. 15(a) the respondent may "expropriate and take any lands actually required for the construction, maintenance and operation of the subways or tunnels authorised by this Act, or may expropriate and take an easement in, over, under or through such lands, without the necessity of acquiring a title in fee simple thereto, after the plan of such lands has been approved by the Governor in Council," etc.

Section 21 provides that "the Railway Act, 1919, shall, so far as is not inconsistent with the special provisions of this Act, unless the context otherwise requires, apply to the company and to its works and undertakings and wherever in the Railway Act, 1919, the word 'railway' occurs, it shall, for the purposes of the company, mean the subways and tunnels authorised by this Act."

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The only section of the Railway Act of 1919 (9 & 10 Geo. V. ch. 68) to which reference need be made is sec. 2, clause 15, which says:—

“‘Lands’ means the lands, the acquiring, taking or using of which is authorised by this or the special Act, and includes real property, messuages, lands, tenements and *hereditaments of any tenure*, and any easement, servitude, right, privilege or *interest in*, to, upon, *under*, over or in respect of the same.”

It clearly appears from the case of *Metropolitan Railway Co. v. Fowler*, [1893] A.C. 416, that the subject-matter to which the award in question relates is a hereditament, and not a mere “easement” in the etymological meaning of that term.

See also *Re Ottawa Gas Co. and City of Ottawa* (1919), 45 O.L.R. 617; *Toronto Corporation v. Consumers’ Gas Co.*, [1916] 2 A.C. 618.

Thus it appears that the subject-matter which is expropriated is “lands” actually required for the construction of the subways and tunnels authorised by the special Act. Mr. Robertson argues that “lands” is limited to the whole of the lands, from the centre of the earth to the sky, through which the tunnel goes, and of which it forms a part, and that the Act does not empower the tunnel company to take a parallelopipedon of the subsoil such as is described in the notice of expropriation, and refers us to the case of *Farmer v. Waterloo and City Railway Co.*, [1895] 1 Ch. 527.

A critical examination of the report of that case makes it plain to me that neither the decision nor the obiter observations of Kekewich, J., have any bearing on the construction of the Canadian statutes here in question. In the statement of facts, at p. 528, it appears that the lands there in question were lands with houses on them. Section 92 of the Land Clauses Consolidation Act, 1845, enacts that:—

“No party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof.”

At p. 40 of Cripps on Compensation, 6th ed. (1922), it is said that sec. 92 of the Land Clauses Act applies to a tunnel, and that that statute does not empower the promoters of the undertaking to compel an owner to create an easement over his land; and, where part of a house or other building or manufactory is tunnelled under or arched over, the company must, under sec. 92, take the whole, unless express provision to the contrary is inserted in the special Act.

The special Act incorporating the Waterloo and City Railway Company (the defendants in the *Farmer* case) contained an exception to the above clause of the general Act, whereby it was provided that the promoters "shall not be required wholly to take those lands, or any part of the surface thereof, or any houses, buildings, manufactories, and premises therein, or any cellar, vault, or other construction held or connected therewith."

After adverting to the circumstance that the special Act created an exception to the general Act, Kekewich, J., goes on, at p. 531, to say:—

"Independently of this special provision, of course the railway company could not take the subsoil and under-surface as against the unwilling landowner. Before that enactment he would have been entitled to say, 'The land is mine from the centre of the earth to the heaven, and if you take a square inch of it between those two extreme points I will insist on your taking the whole.' That would have been his right, and it is on that right that a modification is here introduced."

That observation appears to be absolutely well-founded if confined to the English law applicable to the facts of the case then under consideration, but it is not the enunciation of any general principle of the law of expropriation.

No provision corresponding to sec. 92 of the Land Clauses Act is to be found in the special Act under which the respondent is proceeding, and the words of that Act taken in their ordinary signification seem to me to empower it to expropriate and take *any* lands actually required for the construction of the tunnel. There being no limitation of those words, as there is in sec. 92 of the Land Clauses Act, they are adequate and sufficient, in my opinion, to enable the respondent company, without taking the surface, to expropriate specifically and by itself any part of the claimants' lands, including the subsoil which they have assumed to take.

For these reasons, I am of opinion that the notice of expropriation was well given, that the proceedings have been regular, and that the award should not be interfered with.

I have dealt with the question raised as if it were properly before the Court, but I should add that, in my opinion, the appellants ought not to be allowed to raise the question on this appeal. Apart from the basis upon which I have reached the conclusion above stated, there is power given by the special Act to take separately that which has been taken either as an easement or under sec. 15(b), and so arrive at the result desired. The lands have been taken, and, as I assume, actually entered upon, and

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App. Div. the tunnel bored. The arbitration proceedings were concluded
1930. without the question now before us having, at any time, been
raised, and it is not referred to in the notice of appeal.

RE KOLODZI Rule 491(2) provides that, on an appeal, "The notice shall
AND state the nature of the relief asked and shall set forth the grounds
DETROIT of appeal, and no other grounds may be argued, save by leave of
AND the Court."
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In *Wilson v. United Counties Bank Ltd.*, [1920] A.C. 106, three of the Law Lords lay it down, in emphatic language, that, unless under most exceptional circumstances, the appellant should be limited to the reasons set out in his appeal. That rule was adopted in our courts more than 10 years ago; and, while it has been applied with a gentle hand, it has never been dissented from. See *Lowry v. Robins* (1919), 45 O.L.R. 84; *Adams v. Windsor Truck and Storage Co.* (1920), 48 O.L.R. 446, at p. 448; *Clark v. Duncan* (1923), 53 O.L.R. 287, at pp. 292 and 293.

Quite recently there has been an increasing tendency on the part of counsel for appellants towards limiting their grounds of appeal to the broad statement that the verdict or the judgment is contrary to the law and the evidence and the weight of the evidence.

In my opinion, this tendency should be checked; and, if the appellant seeks the indulgence of the Court, it should only be granted on the terms that the hearing of the appeal be enlarged, with costs of the day fixed at a fair sum to be paid by the appellant to the respondent forthwith, as a condition precedent.

In the present case the objection goes deeper, for the arbitration has proceeded, evidence has been led at great length, the award made, and the appeal taken, without a suggestion that the steps taken were unwarranted; not only so, but the result intended, which clearly was within the powers conferred by the special Act, has in fact been achieved; the lands have been physically taken and the compensation for them ascertained.

If, contrary to the view which I have first expressed, a defect exists, it is an irregularity of procedure rather than a lack of jurisdiction; and, as it has occasioned no prejudice to the appellants, no effect should be given to it.

In my opinion, the appeal should be dismissed with costs.

ORDE, J.A.:—I agree with the judgment of my brother Masten and would dismiss the appeal.

The English authorities relied on by the appellants have no application to the provisions of our statute. The power to expropriate given by the Railway Act extends to lands in the widest

possible meaning of that term. If it is possible, as it is, to convey to another one flat in a building or a stratum of earth, the title to all the remaining part of the whole parcel being retained by the grantor, it is equally possible to convey to another a core of earth, retaining the title to all that is left, above, below, and around it. If it is possible to convey such a core, there is no technical or legal objection to its expropriation under the comprehensive provisions of the Act.

It is of course obvious that in many cases the damage resulting to the owner from such a limited expropriation might be as great as if the whole parcel from the centre of the earth to the sky had been taken, but that would be for the arbitrator. It could not affect the right of the company to proceed in that way if it were foolish enough to do so.

FISHER, J.A., agreed with MASTEN, J.A.

RIDDELL, J.A.:—The respondent, the Detroit and Windsor Subway Company, was incorporated by the Act 17 Geo. V. ch. 83 (Dom.) to construct subways, etc., under the Detroit river; by sec. 15(a) powers were given to “expropriate and take any lands actually required for the construction, maintenance and operation of the subways or tunnels authorised by this Act, or . . . expropriate and take an easement in, over, under or through such lands without the necessity of acquiring a title in fee simple thereto.” And by sec. 15(b) it was provided that the company might, “in reduction of the damage or injury to any lands taken or affected by such authorised works, abandon or grant to the owner or party interested therein any portion of such lands, or any easement or interest therein, or make any structures, works or alterations in or upon its works for such purposes. And if the company by its notice of expropriation or some subsequent notice, prior to the first meeting of the arbitrators, specify its decision to take only such lands or easement or interest in lands, or to make such structures or works or alterations, the damages (including damages, if any, resulting from the change in the notice of expropriation) shall be assessed by the arbitrators appointed pursuant to the provisions of the Railway Act, 1919, in view of such specified decision or undertaking, and the arbitrators or arbitrator shall declare the basis of their award accordingly.”

The provisions of the Railway Act, 1919, were incorporated in this special Act so far as applicable (sec. 21).

On the 27th June, 1929, the company caused to be served on the appellants a notice of arbitration pursuant to the Railway Act,

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Riddell, J.A. "All and singular that certain parcel or tract of land and premises situate lying and being in the city of Windsor in the county of Essex and Province of Ontario and being composed of part of lot number 4 according to registered plan No. 91. The part to be taken is of a uniform depth or thickness of 33 feet 6 inches measured vertically the upper face of which is 38 feet 10 inches below the top of the sidewalk at the south limit of Sandwich-street and rises with a uniform grade of 3.97 per cent. going southerly from Sandwich-street. The vertical projection of the above-described parcel at the surface of the ground may be described as follows"—the notice proceeding to set out the position of the land—not here of importance.

It is quite plain that the company was desiring to expropriate a parallelopipedon beneath the surface; and the arbitration that followed was on this basis.

That what the company wished to expropriate is not an "easement" is clear: *Metropolitan Railway Co. v. Fowler*, [1893] A.C. 416; but is "land" within the meaning of such legislation.

That a company can be authorised by Parliament to take such a piece of property is equally clear, and is not disputed; but the question remains whether the company has been given such powers—I think not.

In *Farmer v. Waterloo and City Railway Co.*, [1895] 1 Ch. 527, 11 Times L.R. 210, the company had statutory powers to "appropriate and use the subsoil and under-surface of any . . . lands." Mr. Justice Kekewich, at p. 531, says:—

"Independently of this special provision, of course the railway company could not take the subsoil and under-surface as against the unwilling landowner. Before that enactment he would have been entitled to say, 'The land is mine from the centre of the earth to the heaven, and if you take a square inch of it between those two extreme points I will insist on your taking the whole.' That would have been his right."

How and by what words the power to take such a portion of land as is required for a tunnel is shewn by the statutes mentioned in such cases as *Metropolitan Railway Co. v. Fowler*. This decision has stood for 35 years, it has been cited in the text-books (e.g. in Cripps on Compensation, 6th ed., pp. 73, 93), and has not been questioned. Independently of any decision in that sense, bearing in mind that no one is to be deprived of his property without clear authority, I should hold that the company, without

legislative authority, cannot take such a section out of a freehold, but is bound to take the freehold *ab centro usque ad cælum*. App. Div.
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The arbitration did not proceed on that basis, and I think that the award cannot stand, but must be set aside with costs here and below. RE KOLODZI AND DETROIT AND WINDSOR SUBWAY CO. Riddell, J.A.

The parties are willing to treat the notice actually served as a notice justified by the Act, so as to avoid the necessity of serving another notice—that, however, is an arrangement between two sensible counsel, with which we have nothing to do.

Appeal dismissed (RIDDELL, J.A., dissenting.)

[ORDE, J.A.]

O'CONNOR v. WALDRON.

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May 5.

Defamation—Absolute Privilege—Statements Made by Commissioner in Course of Inquiry and Investigation—Combines Investigation Act, R.S.C. 1927, ch. 26—Inquiries Act, R.S.C. 1927, ch. 99—Frivolous or Vexatious Action—Summary Dismissal—Rule 124—Public Policy—Powers of Commissioner—Exercise of Judicial Functions—Tribunal Recognised by Law—Constitutional Law—Validity of Dominion Statute.

In an action for slander the statement of claim did not allege or disclose the occasion on which the alleged defamatory words were spoken:—

Held, that, if the defendant's motion to dismiss the action was limited to the first branch of Rule 124—that the statement of claim disclosed no reasonable cause of action—the motion would fail.

The pleadings and admissions, however, made it clear that the words were spoken by the defendant in the course of certain proceedings before him as a Commissioner appointed by the Crown, under the authority of the Combines Investigation Act, R.S.C. 1927, ch. 26, and of the Inquiries Act, R.S.C. 1927, ch. 99, to conduct an inquiry and investigate the businesses of certain organisations, and to report to the Minister of Labour the results of his investigation, together with the evidence taken before him and any opinion he might see fit to express thereon. The ground for this motion was that the defendant was absolutely privileged on the occasion on which, as alleged, he spoke the words complained of:—

Held, that, even where the statement of claim is so framed (as here) as not to disclose such facts as if disclosed would justify the dismissal of the action, as unfounded, upon any reasonable ground, the Court may, if the unquestioned facts disclose that there is no reasonable cause of action, dismiss the action as frivolous or vexatious, not only under the latter part of Rule 124, but by virtue of its inherent power to prevent the abuse of its own process.

Held, also, that the defendant, by reason of his status as a Commissioner, was entitled to the same protection as if he was a judge of a court, the occasion being absolutely privileged.

The rule of law is that no action for libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or

1930. spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law.
- O'CONNOR *Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255, followed.
v. The rule is not designed for the personal protection of the judge or
WALDRON. other person. It is founded on public policy in order that those engaged in the administration of justice may proceed unhampered by the fear that some unguarded or hasty statement may subject them to an action for defamation—and the rule is applicable even when the defamation is deliberate or there is actual malice.
- Having regard to the nature of the defendant's commission and the purposes for which it was issued and to the statutory provisions designed to accomplish those purposes, the proceedings before the defendant were absolutely privileged.
- The defendant's functions were judicial, not merely administrative, although he had no power to pronounce a judgment or decision.
- Copartnership Farms v. Harvey-Smith*, [1918] 2 K.B. 405, explained.
- Barratt v. Kearns*, [1905] 1 K.B. 504, applied.
- Re Singer* (15th November, 1929), not reported, and *Re Singer* (1929), 37 O.W.N. 3, referred to.
- The Combines Investigation Act is *intra vires* of the Dominion Parliament: *In re Reference as to the Validity of the Combines Investigation Act*, [1929] S.C.R. 409.
- The action was therefore summarily dismissed.

MOTION by the defendant under Rule 124* for an order dismissing the action upon the ground that the statement of claim disclosed no reasonable cause of action or that the action was frivolous or vexatious.

April 17. The motion was heard by ORDE, J.A., in the Weekly Court, Toronto.

H. H. Davis, K.C., for the defendant.

The plaintiff in person.

May 5. ORDE, J.A.:—The action is for damages for certain statements alleged to have been made by the defendant on the 27th September, 1929, with relation to the plaintiff's profession as a barrister, and it is alleged that the statements imputed to the plaintiff the commission of a crime punishable by imprisonment.

The ground for the motion is "that the defendant was absolutely privileged on the occasion on which it is alleged he spoke the words complained of."

The statement of claim alone fails to allege or disclose the occasion when the alleged defamatory words were spoken. If the motion were limited simply to this first branch of Rule 124, namely, that the statement of claim disclosed no reasonable cause of action, the motion would fail.

* 124. A Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shewn to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

The defendant contends, however, that upon the allegations in the statement of defence and in the plaintiff's reply thereto and upon certain admissions made by the plaintiff in the particulars furnished by him, and on his examination for discovery, it is clearly established that the alleged defamatory words were spoken upon an occasion which was absolutely privileged, and that the action ought therefore to be dismissed as frivolous or vexatious.

The pleadings and admissions already mentioned make it quite clear that the words were spoken by the defendant during the course of certain proceedings which he was conducting as a Commissioner appointed by letters patent under the Great Seal of Canada by the Governor-General under the authority of the Combines Investigation Act, R.S.C. 1927, ch. 26, and of the Inquiries Act, R.S.C. 1927, ch. 99. The purpose of the commission was to conduct an inquiry with respect to certain matters set forth in the order in council which is attached to the commission, those matters consisting of certain representations which had been made to the Minister of Labour to the effect that the operations of certain organisations constituted a combine within the meaning of the Combines Investigation Act. The order in council authorised the appointment of the defendant as a Commissioner to investigate the businesses of the organisations in question and of their members and of any other person who might be or be believed to be a member of the alleged combine or a party or privy thereto. And by the commission the defendant was directed to report to the Minister the results of his investigation, together with the evidence taken before him and any opinion he might see fit to express thereon.

It is quite settled, I think, that even where the statement of claim is so framed, as it is here, as not to disclose such facts as if disclosed would justify the dismissal of the action, as unfounded, upon any reasonable ground, the Court may, if the unquestioned facts disclose that there is no reasonable cause of action, dismiss the action as frivolous or vexatious, not only under the latter part of the Rule, but by virtue of its inherent power to prevent the abuse of its own process. See *The Annual Practice*, 1930, pp. 423 and 424, and *Holmsted's Judicature Act*, 4th ed., p. 546.

If, for example, an action for slander were brought against a Judge of the Supreme Court for words spoken in court during the course of a trial, but the statement of claim were so framed as not to disclose the occasion when the words were spoken, there could be no question, in my opinion, as to the power and duty of the Court, as soon as it was made clear that the words had been

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spoken in court, to dismiss the action as vexatious, for the simple reason that it must be hopeless because the plea of absolute privilege would be a complete defence. It would be improper that in those circumstances the defendant should be harassed by any further proceedings in an action which could not possibly succeed.

The same procedure is applicable here, and, while the defendant is not a Judge, he is entitled to the same protection if, by reason of his status as a Commissioner, the occasion in question was absolutely privileged.

That, therefore, is the sole question for my determination. Nothing more could be elicited at a trial than is now before me, necessary for a decision upon that point.

The rule of law as to the defence of absolute privilege is well settled. "No action will lie for defamatory statements, whether oral or written, made in the course of judicial proceedings before a Court of justice or tribunal recognised and constituted according to law, even though such statements were made maliciously, without any justification or excuse, and from personal ill-will or anger against the party defamed:" Gatley on Libel and Slander, 2nd ed., p. 187. Or as put by Kelly, C.B., in *Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255, at p. 263: "The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law."

This rule of law is not designed for the personal protection of the judge or counsel or witness or party. It is founded on public policy in order that those engaged in the administration of justice may proceed unhampered by the fear that some unguarded or hasty statement may subject them to an action for defamation. And in order to afford that protection and guarantee that freedom from restraint the rule is made applicable even when the defamation is deliberate or there is actual malice. Were it not so, the privilege would be merely qualified and not absolute. As put by Fry, L.J., in *Munster v. Lamb* (1883), 11 Q.B.D. 588, at p. 607, "It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty."

Or as put by Channell, J., in *Bottomley v. Brougham*, [1908] 1 K.B. 584, at p.587:—

"The reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants should

be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious."

It is equally well established that the rule applies not only to proceedings before an ordinary court of justice, whether it be a superior or inferior court of record or an inferior court not of record (with some qualification where a judge of an inferior court knowingly acts beyond his jurisdiction), but to proceedings before a tribunal recognised by law, which, though not a court in the ordinary sense of the word, exercises judicial functions, that is, acts in a manner similar to that in which a court of justice acts in respect of an inquiry before it: *Gatley*, 2nd ed., p. 200. The only question here is whether or not the proceedings had before the defendant during the course of his inquiry or investigation by virtue of his commission fall within this category. If they do, he is entitled to the protection afforded by his plea of absolute privilege. If not, the action must go on to trial.

I am clearly of the opinion, having regard to the nature of the defendant's commission and the purposes for which it was issued and to the statutory provisions designed to accomplish those purposes, that the proceedings before the defendant were absolutely privileged.

The plaintiff, who appeared in person, argued that for the defence of absolute privilege there must be a court, or tribunal acting judicially, that is, as a court, and he suggested that, as the defendant had no power under his commission to pronounce any judgment or decision which affected the status or rights of any person, but was required merely to report the result of his inquiry, his functions were merely administrative and not judicial.

There is a passage in *Gatley*, 2nd ed., at p. 201, which by itself might lend some colour to this argument. It is there stated that "the fact that its decision" (i.e. the decision of the tribunal) "affects the status of those who come before it is also an important factor." At first blush this statement might indicate that, in examining the powers and functions of the tribunal over the status and rights of persons, the question would be limited to the extent of those powers over those who might, by some analogy to an ordinary law-suit, be considered to be parties, or that something in the nature of a judgment or decision upon some issue was necessary. But the authority referred to by *Gatley* for the statement quoted gives it no such limited meaning. The statement was based upon something said by Sankey, J. (now Lord Chancellor), in *Copartnership Farms v. Harvey-Smith*, [1918]

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Orde, J.A. 2 K.B. 405, at p. 412. That case decided that a local military tribunal appointed under the British Military Service Acts (1916) was a judicial body, and that defamatory statements made by a member thereof in the course of its proceedings were absolutely privileged. In dealing with its functions in order to determine the character of the tribunal, he pointed out, at p. 412, that the tribunal had power to interfere with a man's status and had power to impose the penalty of imprisonment for making false statements even though not under oath. He further deals with the procedure before the tribunal and with its powers over persons attending it, and describes all these powers as attributes of a judicial tribunal. I think it is clear that when Sankey, J., was there discussing the power to affect a man's status he had in mind not only the person claiming exemption but all others who might be judicially penalised for some breach of the statute under which the tribunal was acting or of the procedure governing its sittings.

Just where is the exact dividing line between those tribunals which exercise judicial functions and those which do not has probably not yet been definitely determined, but it is clear from the authorities that the test is not whether or not the purpose of the tribunal is to come to some effective conclusion in the nature of a judgment binding upon or affecting the rights or status of one or more persons. If, during the course of its proceedings and for the purpose of rendering them effective in accomplishing the objects or purposes for which the tribunal was constituted, it is clothed with powers such as are given to or are inherently possessed by courts of justice, then the tribunal may be acting judicially, and the proceedings before it may consequently be absolutely privileged.

On the other hand, if, in the exercise of its functions, a body, which for certain other purposes may be clothed with judicial powers, is in the particular matter merely acting in an administrative character, then its proceedings may not be absolutely privileged. For example, it was held in *Attwood v. Chapman*, [1914] 3 K.B. 275, that a body of justices of the peace, when hearing an application for the renewal of a tavern-licence, was not a court of law or acting judicially. That case followed *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431, where it was held that the London County Council, when hearing and dealing with applications for music and dancing licences, was acting administratively, and that its proceedings were not absolutely privileged so as to give absolute immunity to one of its members for a defamatory statement.

In *Collins v. Henry Whiteway & Co.*, [1927] 2 K.B. 378, it was held that a Court of Referees constituted under the Unemployment Insurance Act, 1920, for the purpose of deciding claims upon the unemployment insurance funds, was a court discharging administrative duties only and that communications to it were not absolutely privileged.

On the other hand, there are several cases which establish that a tribunal whose purpose is merely to make an inquiry or investigation is entitled to the protection of the rule of absolute privilege if in the conduct of its proceedings it is clothed with powers such as those exercised by a Court. In *Dawkins v. Lord Rokeby*, L.R. 8 Q.B. 255, (1875) L.R. 7 H.L. 744, a military court of inquiry, which was merely empowered to investigate and report, was held to be within the rule. In *Barratt v. Kearns*, [1905] 1 K.B. 504, a commission was issued by the bishop of a diocese under certain English statutes to inquire into the inadequate performance of his duties by a clergyman. It was held that the commission created a judicial tribunal, that the proceedings under it were absolutely privileged, and that consequently no action for slander could be maintained against a witness for defamatory statements made before the commissioners.

The defendant, in my judgment, was clearly performing judicial functions in carrying out the objects of his commission. By sec. 16 of the Combines Investigation Act, he had authority to investigate the business of any person named in the order in council appointing him, and to enter and examine the premises, books, papers, and records of such person. By sec. 22 he was empowered to order the attendance of witnesses for examination upon oath and the production of documents, and to "exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience thereof." Section 33 gives power to preserve order by immediate punishment for contempt in the face of the Commissioner. In addition to the foregoing, the Commissioner was clothed with all the powers conferred upon a commissioner under the Inquiries Act.

Keeping in mind the underlying principle of the rule as to absolute privilege, that it is designed not for the protection of the individual, but as a matter of public policy in order to allow freedom of speech not only to the members of the tribunal but to counsel, witnesses, and parties, it would be inconvenient, if not practically impossible, to conduct an inquiry under the Combines Investigation Act in the public interest if the proceedings are not

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protected by the rule. It is not merely the Commissioner who is to be considered, but counsel, witnesses, and parties. Absolute privilege cannot be denied to one and granted to the others, and it would clearly not be in the public interest if witnesses or counsel appearing before a commissioner under the Act were to be hampered in what they might say during the course of the proceedings by the fear of a possible action for slander. If counsel and witnesses are entitled to that protection, then the Commissioner must be also.

The commission of inquiry in the present case cannot, in my opinion, be distinguished in its character from the military court of inquiry, or the local military tribunal, or the bishop's commission of inquiry, which were in question in the cases already referred to. Mr. O'Connor tried to distinguish the case of the bishop's commission, *Barratt v. Kearns*, upon the ground that the bishop was himself a court, but it was not the court of the bishop that was in question, and it is quite clear from the judgments in that case that they do not rest upon any such ground, but upon the ground that the commission derived its authority from the statutory power given to the bishop to appoint it, and that it created a judicial tribunal with the statutory power of compelling the attendance of witnesses and the production of books. Both that case and that of the military court of inquiry, *Dawkins v. Lord Rokeby*, are singularly like the present case.

Mr. O'Connor referred to several cases where applications for prohibition had been dismissed upon the ground that the bodies sought to be prohibited were not courts. I cannot see their relevancy. The principles upon which prohibition will lie against an inferior court have nothing to do with the rule of law applicable here, and there is no analogy which justifies any attempt to make the principles of prohibition apply. In none of the cases upon absolute privilege have I found any suggestion of such an analogy.

I was also referred to an unreported judgment of the learned Chief Justice of the Common Pleas in *Re Singer*, given on the 13th November, 1929, upon an application for the release of Mr. Singer, who was under detention by the order of the defendant under the commission in question here. During the course of that judgment, certain observations were made as to the defendant's powers under his commission, one of which was pressed upon me, namely, "the Commissioner is not a court, he is at most a judicial officer with powers of investigation only," as being a ruling as to the scope of the defendant's powers, and as such binding upon me.

In the first place, as I read the judgment, it was dealing with the Commissioner's power to detain Mr. Singer after he had in

effect purged the contempt for which he had been imprisoned, and the statement that the commission was not a court was *obiter*. And, secondly, if the judgment is to be regarded as a sweeping ruling as to the limit of the defendant's powers, that question had already been dealt with by my brother Jeffrey in *Re Singer* (1929), 37 O.W.N. 3, in a judgment which was binding upon the learned Chief Justice and is binding upon me.

It was further argued that the Combines Investigation Act was *ultra vires* of the Dominion Parliament. If this question were really before me, I could not properly consider it until the Attorney-General for Canada had been notified. That would be a futile proceeding, for the simple reason that the Act has been held by the Supreme Court of Canada to be valid: *In re Reference as to the Validity of the Combines Investigation Act*, [1929] S.C.R. 409. That decision is, of course, binding upon me, and I am not called upon to consider the possibility of its reversal by the Privy Council upon the appeal which I am informed is now pending.

I must therefore hold that the proceedings before the defendant were absolutely privileged, and there will be judgment dismissing the action with costs, including the costs of this motion.

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Bankruptcy—Preference—Fraudulent Transfer of Property by Debtor more than 3 Months before Assignment—Attack Barred by Bankruptcy Act, sec. 64—Right of Trustee to Invoke Aid of Assignments and Preferences Act, secs. 4, 5—Bankruptcy Act, sec. 3—Bankruptcy Rule 142—Conflicting Provisions of Ontario and Dominion Acts—“Overlapping.”

In a proceeding in bankruptcy in Ontario, the trustee in bankruptcy may invoke the aid of the Court to set aside as preferential a transaction between the bankrupt and a creditor which took place more than 3 months before the making of the authorised assignment or receiving order, upon the ground that the transaction was preferential under the Assignments and Preferences Act, R.S.O. 1927, ch. 162; and the trustee in bankruptcy is a person entitled to set up the provisions of that Act and attack the transaction.

Sections 3 and 64 of the Bankruptcy Act, Bankruptcy Rule 142, and secs. 4 and 5 of the Assignments and Preferences Act, considered.

The Court is bound to give the benefit of any statute that may be in force and passed for the protection of creditors to their trustee, as it is his duty to administer the whole of the debtor's property, and for that purpose a trustee has the right to follow property preferentially given or conveyed, even if the gift or conveyance was made more than 3 months before the making of the authorised assignment or receiving order. The combined effect of the statutory provisions and the Rule referred to is to give to a trustee in bank-

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ruptcy, without special enabling words, power to impeach all fraudulent or preferential transactions which may by the Bankruptcy Act or provincial law be avoided. Neither the Assignments and Preferences Act nor the Fraudulent Conveyances Act has been abrogated, and these Acts, apart from conflicting sections, are still running concurrently with the Bankruptcy Act and may be resorted to by a trustee under that Act, if it is found that relief cannot be obtained thereunder.

Hoffar Ltd. v. Canadian Men's Trust Association, [1929] 1 W.W.R. 557, and *Canadian Credit Men's Trust Association v. Hoffar Ltd.*, [1929] S.C.R. 187, applied.

Conflict is to be found when sec. 64 of the Bankruptcy Act is read in connection with sec. 5 *et seq.* of the Assignments and Preferences Act; but sec. 64 does not attempt to interfere directly with provincial legislation dealing with the same subject-matter; subsecs. 3 and 4 of sec. 4 of the Assignments and Preferences Act cover transactions not covered by the Bankruptcy Act, and are not in conflict with that Act; if these subsections do deal with the same subject-matter, it is a case not of conflict but of "overlapping."

Grand Trunk Railway Co. v. Attorney-General for Canada, [1907] A.C. 65, referred to.

THE trial of an issue arising in bankruptcy proceedings having been directed by an order of the Court, two questions of law were ordered to be heard before the trial of the issue upon the facts. This issue was as to the validity of a transfer of goods by the debtor to Freedman & Ellis Ltd.

The hearing was before FISHER, J.A., at a sittings of the Court in Bankruptcy.

R. S. Robertson, K.C., for the trustee in bankruptcy of the estate of A. T. Pommier, the debtor.

I. F. Hellmuth, K.C., for Freedman & Ellis Ltd.

May 5. FISHER, J.A.:— Pommier carried on a jewellery business in Timmins, Ontario, and made an authorised assignment in March, 1928.

On the 20th June, 1927, the trustee alleges, Pommier unjustly preferred Freedman & Ellis Ltd. to his other creditors by giving or transferring to them, out of his stock-in-trade, diamonds to the value of \$2,712.35, and has attacked the transaction. An order was made on the 3rd May, 1928, directing the trial of an issue to determine whether or not the transaction was void.

Because of the fact that the alleged gift or transfer took place more than 3 months before the authorised assignment, and might have to be attacked under the Assignments and Preferences Act, R.S.O. 1927, ch. 162, and counsel for Freedman & Ellis Ltd. having raised the question of the right of a trustee in bankruptcy to any relief under that Act, it was agreed between counsel that, before a trial should take place on the merits of the transaction, the opinion of the Court should be obtained on two questions:—

(1) In a proceeding in bankruptcy, can the trustee in bankruptcy invoke the aid of the Court to set aside as preferential a transaction between a bankrupt and a creditor which took place more than 3 months before the assignment in bankruptcy, upon the ground that the transaction was preferential under the Assignments and Preferences Act?

(2) Is the trustee in bankruptcy a person entitled to set up the provisions of the said Assignments and Preferences Act and attack such a transaction?

The questions raised for determination are of great importance and were ably argued by both counsel.

Mr. Hellmuth's contentions are: (1) that, there being conflict between sec. 64 of the Bankruptcy Act, R.S.C. 1927, ch. 11, and sec. 4 of the Ontario Assignments and Preferences Act, the Bankruptcy Act governs, and proceedings under the Assignments and Preferences Act are not available to a trustee to attack fraudulent preferences in bankruptcy; (2) that, apart altogether from this conflict, the Dominion Parliament having passed the Bankruptcy Act with its ancillary provisions to carry it out, the field is occupied by that Act, and the Assignments and Preferences Act is shut out in its entirety; and (3) that, under sec. 9, subsec. 7, of the Bankruptcy Act, no assignment under the Assignments and Preferences Act can now be made, and therefore a trustee in bankruptcy is not a *person* entitled to invoke the aid of the Assignments and Preferences Act to set aside fraudulent preferences.

It will at once be observed that, if Mr. Hellmuth's contentions that an insolvent debtor's transactions involving fraudulent preferences, if made more than 3 months before an authorised assignment, or the making of a receiving order, cannot be attacked under sec. 64 of the Bankruptcy Act, and no relief can be obtained under the Assignments and Preferences Act, or the Fraudulent Conveyances Act, because of their conflict with the Bankruptcy Act, and also that, even if that Act could be resorted to, a trustee in bankruptcy has no status to make an attack, because he is not a proper *person*, are well-founded, the way would be wide open for the grossest frauds to be committed by persons disposing of all or nearly all their property to some creditor, or to a person who is not a creditor, and, after a period of 3 months from the disposal, making an authorised assignment or permitting a receiving order to be made; and also that, even if made to a *creditor*—judgment or otherwise—where no assignment is made by the debtor (the provincial statutes being wiped out by the Bankruptcy Act), no relief can be obtained in the courts.

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Under sec. 64 of the Bankruptcy Act (formerly sec. 31), every conveyance, security, or payment, when given or made with a view to prefer, within 3 months prior to the filing of the petition on which a receiving order is made, or prior to an authorised assignment, is void; and the section also declares that the intent to prefer is *primâ facie* presumed if the effect of the transfer or payment is in fact to prefer.

Under sec. 4 of the Assignments and Preferences Act, R.S.O. 1927, ch. 162, all gifts, conveyances, assignments, or transfers, etc., etc., if made with intent to defeat, hinder, delay, or prejudice creditors, are void.

Under the Assignments and Preferences Act, if the transaction is attacked by a creditor within 60 days, or if an assignment is made within 60 days, then the transaction is presumed *primâ facie* to have been made with the intent to prefer, to the prejudice of the creditors; that presumption may be rebutted, the onus being on the attacking party, as it is under sec. 64 of the Bankruptcy Act; but, if there be no action or assignment within 60 days, the onus rests on the creditor or the assignee attacking to rebut the presumption. See *Thompson v. Morrison* (1907), 9 O.W.R. 179; *D'Avignon v. Bomerito* (1911), 3 O.W.N. 158, 20 O.W.R. 211; *Clifton v. Towers* (1917), 39 O.L.R. 292. Under the provincial British Columbia Assignments and Preferences Act, the transaction is utterly void and the presumption is irrebuttable.

The Bankruptcy Act makes fraudulent preferences and fraudulent conveyances acts of bankruptcy. See sec. 3(a), (b), and (c). These clauses read:—

“(a) If in Canada or elsewhere he (the debtor) makes an assignment of his property to a trustee for the benefit of his creditors generally, whether it is an assignment authorised by this Act or not;

“(b) If in Canada or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof;

“(c) If in Canada or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this Act be void as a fraudulent preference if he were adjudged a bankrupt.”

Clause (b) refers to transactions beyond the Bankruptcy Act, such as a fraudulent conveyance under the Fraudulent Conveyances Act, R.S.O. 1927, ch. 134, and clause (c) to preferences within the Act. Part of Bankruptcy Rule 142 (formerly 120) reads as follows:—

"Applications by a trustee, or any person, to set aside or avoid under the Act, or any other Act or law, any settlement, conveyance, transfer, security or payment, or to declare for or against the title of the trustee to any property adversely claimed . . . shall be to a Judge in Chambers."

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I note here that this section (3) of the Act recognises that there may be fraudulent transactions outside of those mentioned in the Bankruptcy Act; and, if they are read in connection with Rule 142, it would appear that such transactions may be attacked by a trustee.

Mr. Hellmuth strenuously argued that the whole of the Assignments and Preferences Act has been abrogated, and that a trustee in bankruptcy cannot now invoke the aid of that Act to void fraudulent preferences, because of the fact that, since the passing of the Bankruptcy Act with its ancillary provisions, provincial legislation cannot be resorted to. Mr. Hellmuth supports his contentions by reference to sec. 9(7) of the Bankruptcy Act, which voids all assignments for the benefit of creditors unless made under that Act, and therefore it is a trustee under the Bankruptcy Act only who can take proceedings, and to the fact that, there being direct conflict, as found in sec. 64 of the Bankruptcy Act and sec. 4(1) and (2) of the Assignments and Preferences Act as to the time fraudulent preferences must be attacked, the Bankruptcy Act, being Dominion legislation, prevails; to *Attorney-General for Ontario v. Attorney-General for Canada*, [1894] A.C. 189, and particularly to what was there said by Lord Herschell; to *Attorney-General for Canada v. Attorney-General for Ontario Quebec and Nova Scotia*, [1898] A.C. 700; to a recent decision of the Court of Appeal of British Columbia, *Hoffar Ltd. v. Canadian Credit Men's Trust Association*, [1929] 1 W.W.R. 557; and to the judgment of Mignault, J., in the same case, *sub nom. Canadian Credit Men's Trust Association Ltd. v. Hoffar Ltd.*, [1929] S.C.R. 187, upon an application to him for special leave to appeal.

After careful consideration of the provisions of the Bankruptcy Act, the Assignments and Preferences Act, and the decisions to which I shall make reference, I am unable to give effect to Mr. Hellmuth's contentions.

I frankly admit that conflict is to be found when sec. 64 is read in connection with sec. 5 of the Assignments and Preferences Act and the following sections, except possibly sec. 12, and that, the Bankruptcy Act being Dominion legislation, as to this conflict the Dominion Act prevails; but, in my opinion, sec. 64 does not attempt to interfere directly with provincial legislation dealing with the same subject-matter, because it is quite clear

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Act, and in those respects are not in conflict with the Bankruptcy
RE Act, and that these subsections are still operative; but, even if it
POMMIER. could be said that these subsections do deal with the same subject-
matter, it is not one of conflict but of "overlapping." See *Grand
Trunk Railway Co. v. Attorney-General for Canada*, [1907] A.C.
65. In that case it is said (p. 68) :—

"There can be a domain in which provincial and Dominion
legislation may overlap, in which case neither legislation will be
ultra vires, if the field is clear; and, secondly, that if the field is
not clear, and in such a domain the two legislations meet, then
the Dominion legislation must prevail."

It is a well-known doctrine that while a Province may
legislate on things which from one aspect and for one legislative
purpose may fall within the power of the Province, the Dominion
may also deal with the same matter from the Dominion aspect,
and both enactments will be held to be valid. See *Hodge v. The
Queen* (1883), 9 App. Cas. 117. In other words, though the
Dominion, as ancillary to its bankruptcy legislation, may trench
upon the Province's undoubted right to legislate with regard to
contracts, that does not usurp the whole of the Province's power
to regulate the law of contract, but where the Dominion's legis-
lation does trench upon the Province's power, if that legislation
can be validly supported as ancillary to one of the enumerated
powers of the Dominion, then the Dominion legislation overrides
the provincial in so far as they are in conflict. See *Royal Bank
of Canada v. LaRue*, [1928] A.C. 187.

There is no suggestion in the judgment of either the Court of
Appeal in the *Hoffar* case, or what was said by Mignault, J., that
the whole of the Assignments and Preferences Act of that Prov-
ince (British Columbia) was bad and that a fraudulent transaction
could not be attacked by a bankruptcy trustee under that Act;
all that was decided in that case, as I understand it, is that, as
sec. 64 of the Bankruptcy Act provides that the presumption as
to transactions is as to those occurring within a 3-months' period,
and is a rebuttable one, and the Assignments and Preferences Act
provides that it is not rebuttable, there being thus conflict between
the two Acts, the Dominion Act prevails.

Macdonald, J.A., in the *Hoffar* case, [1929] 1 W.W.R. at pp.
559, 560, carefully analysed the conflict between the Acts in ques-
tion, and reached the result that on the same state of facts under
Dominion legislation a rebuttable presumption is raised and under
the Provincial Act a conclusive presumption is raised, and, there

being direct conflict, the Dominion Act prevails. At 562, Mac-Donald, J.A., used this language:—

“This is not to say that the trustee cannot resort to a provincial Act to impeach a transaction. Provincial legislation respecting fraudulent conveyances may be resorted to. The Bankruptcy Act does not abrogate provincial Acts simply because they deal with preferential transactions.”

See also quotation in the judgment of Mignault, J.A., in the *Hoffar* case, [1929] S.C.R. at p. 185, from *Attorney-General for Ontario v. Attorney-General for Canada*, [1894] A.C. 189, at pp. 200, 201.

In answer to the contention that a trustee in bankruptcy is not a person entitled to invoke the aid of the Assignments and Preferences Act to set aside fraudulent preferences, I am of opinion that the Bankruptcy Act was never intended to provide a complete and exclusive code in regard to setting aside transactions. If the Act had so provided, chattel mortgages void under a provincial Act could never be avoided, because the Bankruptcy Act failed specifically to provide a remedy. See *In re Gibbons* (1924), 26 O.W.N. 453, 5 C.B.R. 16, [1924] 3 D.L.R. 619. In that case a chattel mortgage was declared void under a provincial law as against a trustee in bankruptcy; and see also *In re Cohen & Sweigman* (1924), 5 C.B.R. 342, 362, [1925] 1 D.L.R. 248. In that case a transaction not contrary to the Bankruptcy Act was by the Court declared void as against the trustee.

There are also several decisions in our own courts which, while not precisely in point, so far as they go indicate that the Bankruptcy Act was not intended to cut down the rights of creditors as against the debtor or any other creditor in transactions falling within the scope of sec. 4 of the Assignments and Preferences Act. See *Re Longmore* (1922), 2 C.B.R. 585, 52 O.L.R. 570; *Re Berman and Chapman* (1923), 24 O.W.N. 404, 4 C.B.R. 233; and *Re Davison* (1922), 52 O.L.R. 244, 5 C.B.R. 860. See also sec. 12 of the Assignments and Preferences Act, subsec. (3), which provides that:—

“Where there is no assignment for the benefit of creditors, and whether the proceeds are or are not of such a character as to be seizable under execution, an action may be brought therefor by a creditor, whether an execution creditor or not, on behalf of himself and all other creditors, or such other proceedings may be taken as may be necessary to render the proceeds available for the general benefit of creditors.”

Whilst sec. 11 of the Assignments and Preferences Act gives

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ascertain who has *now* the right of action, and there you find it is
RE the trustee in bankruptcy, but this change does not affect the
POMMIER. validity of subsecs. (3) and (4). These subsections provide the
remedy; sec. 11 provides only the mode of exercising the remedy,
and that is now provided by the Bankruptcy Act.

There are many cases under the English Act which decide that a trustee or assignee is the proper person to bring an action to impeach transactions under the Statute of Elizabeth. See *Doe d. Grimsby v. Ball* (1843), 11 M. & W. 531; *Ware v. Gardner* (1869), L.R. 7 Eq. 317; *Kent v. Riley* (1872), L.R. 14 Eq. 190; *In re Fasey*, [1923] 2 Ch. 1; and *Davis v. Snell* (1860), 28 Beav. 321.

Mr. Hellmuth's argument in effect is that in every case which does not fall within sec. 64, and no matter if the transaction is contrary to the policy of the Bankruptcy Act, a trustee in bankruptcy has no remedy and the courts are powerless to grant relief. I do not agree. In my opinion, the Court is bound to give the benefit of any statute that may be in force and passed for the protection of creditors to their trustee, as it is his duty to administer the whole of the debtor's property, and for that purpose a trustee has a right to proceed and follow property preferentially given or conveyed, even if the transfer, gift, or conveyance took place more than 3 months prior to the authorised assignment or the making of a receiving order. It appears to me, and I am of opinion, that the combined effect of Rule 142, sec. 64, and the other sections of the Acts to which I have referred, is to give to a trustee in bankruptcy, without special enabling words, power to impeach all fraudulent or preferential transactions which may by the Bankruptcy Act or provincial law be avoided; that neither the Assignments and Preferences Act nor the Fraudulent Conveyances Act has been abrogated, and that these Acts, apart from the conflicting sections mentioned, are still running concurrently with the provisions of the Bankruptcy Act and may be resorted to by a trustee under that Act, if it is found that relief cannot be obtained thereunder, or, to adopt the words of Macdonald, J.A., in the *Hoffar* case:—

"Unless on the same state of facts we find a different result arising, resort may be had to the provisions of whichever legislation fits the case."

The answer to both questions will be in the affirmative.

The costs of this application will be costs in the issue and be disposed of by the Judge who tries the issue.

[APPELLATE DIVISION.]

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RE NATIONAL TRUST CO. LTD. AND CITY OF TORONTO.

May 9.

RE KILMER AND CITY OF TORONTO.

Assessment and Taxes—Income Tax—Assessment in 1929 in Respect of Income Received in 1928—Death before Completion of Roll of Person Receiving Income—Assessment of Personal Representatives—Assessment Act, sec. 24 (1) (i).

K., a resident of the city of T., died on the 12th August, 1929. In 1928 he had made a return to the assessment commissioner of the city of his income received in the year ending on the 31st December, 1927. He was assessed on that return in 1928, and paid the income tax due in respect thereof in 1929. On the 8th February, 1929, he made a return of the income received by him for the year ending on the 31st December, 1928, and an assessment of \$365,120 was made in respect of that income. The assessment commissioner, learning of the death of K., entered upon the assessment roll, as permitted by sec. 24 (1) (i) of the Assessment Act, R.S.O. 1927, ch. 238, instead of the name of the deceased, the words "Representatives of K., deceased," and the executors of K., to whom probate of his will had been granted on the 18th October, 1929, were assessed for \$365,120 in respect of income:—

Held (FISHER, J.A., dissenting), that the executors were not assessable in respect of an income which they had not received—the income was received in 1928 by K. himself, whose death before the completion of the roll made impossible his assessment in 1929 for the 1928 income.

Provisions of the Assessment Act, R.S.O. 1927, ch. 238, of the amending Act of 1929, 19 Geo. V. ch. 63, sec. 1, and of the Municipal Act, R.S.O. 1927, ch. 233, considered.

Re Baskerville and City of Ottawa (21st January, 1929), unreported decision of the Appellate Division, distinguished.

Sifton v. City of Toronto, [1929] S.C.R. 484, applied.

(The same conclusion was reached in two other assessment appeals).

APPEALS by the executors of Sir Albert Edward Kemp, deceased, by the executors of William Edward Wilder, deceased, and by the executors of George H. Kilmer, deceased, upon special cases stated by the Senior Judge of the County Court of the County of York, from his orders affirming the assessments of the appellants in respect of income.

In all three cases the same question was in effect stated. The question submitted in the *Kemp* case was as follows:—

"Was I right in holding that under the provisions of the Assessment Act and the amendments thereto the representatives of the late Sir Edward Kemp (being the executors under his will) were properly placed upon the assessment roll of the City of Toronto and assessed in the year 1929 in respect of the income received by the testator in the year 1928?"

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January 29 and 30. The appeals were heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, J.J.A.

D. W. Saunders, K.C., and *D. M. Fleming*, for the Kemp executors, appellants, argued that there is nothing in the Assessment Act which empowers the municipal authorities to assess the appellants in 1929 in respect of income received by the testator in 1928. Under the law as it was prior to the passing of the Assessment Amendment Act, 1929 (19 Geo. V. ch. 63), the income tax paid by the deceased in 1928 was upon his income for that year; and his executors could not now be assessed in respect of the same income for 1929. The personal representatives of a deceased person are liable to be assessed in respect of income only in cases where the persons beneficially entitled to the income are resident out of Ontario, or where the income is directed to be accumulated and is not presently distributable, and neither of these conditions appeared here. If the relevant statutes and by-laws authorised the assessment in 1929 of the executors of the deceased for income received by him in 1928, it would be indirect taxation, and therefore *ultra vires*. The *Baskerville* case, which was relied upon by the learned County Court Judge, is distinguishable, and in any event the sections of the Assessment Act under consideration in that case have since been amended or repealed by the Assessment Amendment Act, 1929 (19 Geo. V. ch. 63). The assessment and taxation on income can only be enforced against the very person who receives the income. There must be the conjunction of a living person residing in the municipality and the receipt of the income by such person. The word "person" in sec. 10(1)(a) of the Assessment Act cannot be enlarged by the general definition of the word in the interpretation clause, sec. 1(l). Reference to *Re Donald Mason & Co.* (1927), 61 O.L.R. 350; *Re Gibson and City of Hamilton* (1919), 45 O.L.R. 458; *Sifton v. City of Toronto*, [1929] S.C.R. 484, at pp. 486 and 488. A taxing statute must be strictly construed. Section 4 of the Assessment Act does not affect the appellants: *McLeod v. City of Windsor*, [1923] S.C.R. 696. Section 10 shews what is really taxed. Section 4 is not the taxing clause, but only a declaration of property liable to taxation. The two sections have to be read together. Income cannot be "derived" by executors.

A. J. Thomson, K.C., for the National Trust Company, representing the Wilder estate, appellants, stated the particular facts of the Wilder case, adopted and relied upon the argument of counsel for the Kemp appellants, and further contended that "person" meant "natural person," and did not include representatives. In dealing with income tax matters, special sections deal with personal representatives. It is fair to assume that the

general word "person" in other sections does not include such persons. Section 24, subsec. (1), para. (i), is merely intended to cover the case of a man who has died and no personal representative has been appointed, or the case of the personal representative not being known. As to sec. 98, subsec. 3, at the moment of the assessment there had to be some one in existence against whom the assessment could properly be made.

H. H. Davis, K.C., for the Kilmer executors, appellants, stated the particular facts of the Kilmer case, and adopted and relied upon the argument of counsel for the Kemp appellants. Both Sir Edward Kemp and Mr. Wilder had died in 1929. Mr. Kilmer died in 1928, and, income tax having been paid in 1929, the city sought to assess in 1929, for the purpose of levying in 1930 on income received by the late Mr. Kilmer in his lifetime in 1928. To impose an income tax on executors by virtue of the definition of "person" in sec. 1 (l) of the Assessment Act, as including legal representatives, overlooks the fact that the liability of executors for income tax is expressly decreed by the amendment of 1929, 19 Geo. V. ch. 63, sec. 2 (4). To impose income tax as here sought would be indirect taxation and would be in the teeth of sec. 98 of the Act, and the law as laid down in *McLeod v. City of Windsor*, [1923] S.C.R. 696, at pp. 709 and 712.

G. R. Geary, K.C., and *F. A. A. Campbell*, for the Corporation of the City of Toronto, respondent, contended that assessment and taxation are different things, and that the question before the Court was one of assessment. The word "person" in sec. 10, subsec. 1(a), of the Act includes executors. See para. (l) of sec. 1. The *Baskerville* case (unreported), a decision of this Court, is on all fours with this case, and the learned County Court Judge was right in founding his judgment upon the decision in that case. The income which the city corporation seeks to assess was received by the deceased in his lifetime, was "derived" by him, and the city corporation rightly assessed him through his representatives. This being income not received by a representative, but by the testator, we are entitled to assess it. We are not taxing the representative in respect of income he received for a beneficiary or otherwise. We are assessing income received by the deceased in his lifetime, derived by him. We are assessing income in the hands of Sir Edward Kemp, derived by him, and assessing Sir Edward Kemp's executors, that is Sir Edward Kemp continuing in his executors. Reference to *Re Palmer and City of Toronto* (1924), 26 O.W.N. 84; *City of Ottawa v. Nantel* (1921), 51 O.L.R. 269; *Re Bayack* (1929), 64 O.L.R. 14, at pp. 16 and 22; *Attorney-General of British Columbia v. Ostrum*, [1904] A.C. 144; *City of*

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Board, [1929] S.C.R. 52.

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May 9. MASTEN, J.A. (dealing with the *Kemp* case):—This is an appeal on a special case stated by his Honour Judge Denton, Senior Judge of the County Court of the County of York, on the 7th December, 1929, pursuant to the provisions of the Assessment Act respecting appeals to a Divisional Court.

The question submitted by the learned County Court Judge is as follows:—

“Was I right in holding that under the provisions of the Assessment Act and the amendments thereto the representatives of the late Sir Edward Kemp (being the executors under his will) were properly placed upon the assessment roll of the City of Toronto and assessed in the year 1929 in respect of the income received by the testator in the year 1928?”

The facts as they appear in the special case submitted are as follows:—

“Sir Albert Edward Kemp, a resident of the City of Toronto, died on the 12th August, 1929. Probate of his will was granted on the 18th October, 1929, to the National Trust Company Limited, Virginia Kemp, and Arthur B. Colville, the executors named in the said will.

“In the year 1928 he had made a return to the assessment commissioner of the City of Toronto of his income received in the year ending on the 31st December, 1927. He was assessed on that return in 1928, and paid the income tax due in respect thereof in 1929.

“On the 8th February, 1929, Sir Albert Edward Kemp made a return to the assessment commissioner of the income received by him for the year ending on the 31st December, 1928, and an assessment was made for that income of \$365,120.

“The assessment commissioner of the City of Toronto, learning of the death of Sir Albert Edward Kemp, as permitted by the provisions of the Assessment Act, R.S.O. 1927, ch. 238, sec. 24 (1) (i), entered upon the assessment roll, instead of the name of the deceased, the words ‘Representatives of Sir Albert E. Kemp, deceased,’ and the amount of the income for which they were assessed was \$365,120.

“The executors, the above-named appellants, served a notice of appeal from such assessment to the Court of Revision, the following being the grounds of appeal as endorsed upon the assessment notice:—

“Sir Edward Kemp, within named, died on the 12th August, 1929, and there is no provision in the Assessment Act for assessing him, his representatives, or his estate. The assessment had not been made at the time of his death. In any event the amount of the assessment is excessive.”

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“The appeal came to be heard before the Commissioner of the Court of Revision on the 23rd October, 1929. The Commissioner reserved judgment, and on the 24th October, 1929, gave judgment dismissing the appeal.

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“The appellants then appealed to the Judge of the County Court of the County of York from the decision of the Court of Revision, and the appeal came on for hearing before me on the 25th November, 1929. The amount of the assessment was not in dispute before me.”

The learned County Court Judge also makes his reasons for judgment a part of the special case submitted.

The facts are not in dispute, and the question to be determined on the appeal depends on the construction of certain provisions of the Municipal Act, R.S.O. 1927, ch. 233, and of the Assessment Act, R.S.O. 1927, ch. 238.

For convenience of reference and also in order that the relevant statutory provisions may conveniently be read together and viewed as a whole, I attach to this judgment a schedule containing copies of all the somewhat numerous sections of these Acts which are alleged to bear on the questions here involved.

In considering the question presented for determination on this appeal, it is important to bear in mind that it relates to the preparation and settlement in 1929 of an assessment roll which is to form the basis for consideration by the Council of Toronto when in 1930 it proceeds to enact a by-law adopting the roll prepared in 1929 and assessing and levying on the ratable property set forth in the assessment roll of 1929 the municipal taxes for 1930; further, that the proposed assessment roll here under consideration was completed and returned by the assessor after the 12th August, the date of Sir Edward's death; so that at the time of his death the roll in question did not exist; also that no question arises with respect to the payment by Sir Edward of his income tax for the year 1929. It is presumed to have been paid.

Before discussing in detail the questions arising on this appeal, I desire to refer to two general rules or principles which I think apply and govern the assessing authorities, viz., the assessor, the Court of Revision, the County Court Judge, and the Court of Appeal, in exercising their jurisdiction to determine whether any

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First, no property and no person can be entered on the roll as ratable unless the Assessment Act makes it or him assessable and provides for entry on the roll. Neither principles of equity nor implication will suffice; the authority must be found in the Assessment Act and must be clear and explicit.

In *Cox v. Rabbits* (1878), 3 App. Cas. 473, at p. 478, Lord Cairns says:—

“A taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed.”

In *Tennant v. Smith*, [1892] A.C. 150, at p. 154, Lord Halsbury says:—

“This is an Income Tax Act, and what is intended to be taxed is income. And when I say ‘What is intended to be taxed’, I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that, inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.

“Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation.”

This rule of interpretation has been adopted and applied in numerous cases by our Court of Appeal and by the Supreme Court of Canada when considering the Assessment and Taxation Acts of Ontario.

The second rule or principle is that nothing is assessable unless it is taxable, and thus a duty is imposed on assessing tribunals to inquire, as a preliminary, whether the council of the municipality is empowered to levy a tax on a person in respect of the property which it is proposed to enter on the roll.

Mr. Geary, on behalf of the respondent corporation, submits that assessment is one thing, and taxation another—and that on this appeal we are concerned only with assessment and the Assessment Act. I quite agree that assessment in the sense of “preparation of the roll” is one thing, and taxation in the sense of levying

a rate is another; also that on this appeal we are concerned only with the settlement of the roll. But it does not follow that the Court is to be confined to a consideration of the Assessment Act alone, and that the extent of the taxing power conferred on municipal corporations is excluded from our consideration.

Under Ontario law, preparation and settlement of the assessment roll is an essential preliminary to taxation. "There can be no taxation of income without previous assessment of some person in respect of such income:" *per* Mulock, C.J., in *Re Gibson and City of Hamilton*, 45 O.L.R. 458, at p. 461. Both assessment and taxation are directed to a common purpose and object, viz., the raising of the sums necessary for paying the municipal outlay for the current year. As nothing is taxable unless it appears on the roll, so in like manner nothing can properly appear on the roll as taxable unless the municipality is empowered to levy taxes on it. In the other words, the purpose of the roll is to prepare a record of the property and of the persons legally taxable.

It is on the basis of the assessment roll as finally adopted by council that the general tax rate for the year in which it is adopted is declared and levied by the council. It follows as a necessary implication that nothing should be included in the report of ratable properties (i.e. the assessment roll) except that which the council is empowered to tax, and so, in order to ascertain whether any property alleged to be assessable ought to be entered on the roll, the first inquiry must be: "Is it taxable?"

Inasmuch as the preparation of the roll is an administrative proceeding preliminary to the executive act of taxation, and consists in setting forth the persons and property that are taxable, the consideration of what is taxable is not only directly relevant but necessary to be considered by this Court on its final settlement of the roll on this appeal.

I shall at a later stage discuss the authority to tax which the statute confers on municipal councils, with the view of inquiring whether it empowers the respondent to tax the income in question.

For reasons about to be stated, I have reached the conclusion that the application to the facts of this case of the two rules or principles just stated necessitates an answer in the negative to the question propounded by the learned County Court Judge.

The respondents, in their argument, bow to the observation of Anglin, J. (as he then was), in *McLeod v. City of Windsor*, [1923] S.C.R. 696, at p. 709, and admit that, while sec. 4 of the Assessment Act declares a general intention that all income earned, derived, or received in the Province, not specially exempted, shall be taxable, yet taken by itself that section does

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not authorise the assessing authorities to enforce such general intention. See also the judgment of Latchford, C.J., in *Re Fox and City of Windsor* (1925), 57 O.L.R. 243, at p. 244. It is also conceded by the respondent corporation that sec. 24 (1) (i) of the Act is concerned with the form of the roll which the assessor is to make up and return but does not confer power to assess executors.

Counsel for the respondent corporation rest their main contention on the combined effect of sec. 10, subsec. 1(a), and para. (l) of sec. 1, of the Assessment Act, and submit that the word "person" in sec. 10 includes executors, as if it read, "Every person and the executors of every person who has died during any year before his income has been assessed shall be assessed in respect of income."

I deal first with this contention of the respondent corporation that the interpretation clause, sec. 1(l), enables the assessing authorities to assess the executors of Sir Edward, assuming (though I do not find it established) that they are living persons residing in the municipality, and I consider along with it the argument of the appellants that assessment and taxation on income can only be enforced against the very person who receives the income.

All taxation may be divided into two categories—taxation *in rem* and taxation *in personam*. Taxation of land and taxation of a fund in the hands of trustees (sec. 12 as amended in 1929) afford examples of taxation *in rem*. See also the case of *Erie Beach Co. Ltd. v. Attorney-General for Ontario*, [1930] A.C. 161, for a recent example of taxation *in rem*.

A poll tax affords the outstanding example of taxation *in personam*.

Income tax appears to me to be a tax *in personam*, for income cannot be assessed without the assessment of an individual or legal person because it has no tangible existence and can only be reached through persons.

In the case under consideration, there is no *res* which can be segregated and assessed. According to the Assessment Act as amended in 1929 the income to be assessed shall be the income received during the year ending on the 31st December then last past.

The income received by Sir Edward Kemp in 1928 did not, in October, 1929, when the assessment took place, form a segregated fund which could be assessed *in rem*. I take it that without direct evidence the Court is entitled to assume by way of common knowledge that in part it was eaten up in current living expenses during 1928, and that the surplus became intermingled

with capital investments and indistinguishable from them. But, whether this is so or not, when Sir Edward died in August, 1929, the surplus of his income not exhausted in prior expenditures passed to his executors as capital indistinguishable from any other capital. It is plain therefore that in October, 1929, there was no fund of 1928 income in the hands of the executors which could be assessed as such. It therefore seems clear that the assessment in question cannot be an assessment *in rem* of the income received by Sir Edward Kemp in 1928.

Then if this cannot be an assessment *in rem* because there is no *res*, it must be an assessment *in personam*, and that agrees with the words of sec. 10 of the Assessment Act, "Every *person* . . . shall be assessed in respect of income."

The clause of the Assessment Act making income ratable property is clause 10, which as amended in 1929 reads as follows:—

"10.—(1) Subject to the exemptions provided for in sections 4 and 9:

"(a) Every person not liable to business assessment under section 9 shall be assessed in respect of income. . . .

"(2) The income to be assessed shall be the income received during the year ending on the 31st of December then last past."

Then does the statute of 1929 change the quality of the tax in question from a tax *in personam* to a tax *in rem*?

No doubt the Legislature is supreme, and if within the ambit of its jurisdiction it declares that, in Ontario, black shall hereafter be white, the courts are bound to adjudicate in accordance with the law so enacted. But, if the statute is capable of a reasonable and fair interpretation which at the same time accords with reality, such an interpretation is naturally to be preferred by the Court. The statute of 1929 does not say that the *person* is no longer to be assessed. That would have been fatal to the enforceability of the tax. What it does say is that an intangible something, viz., an income received two years prior, shall be taxed. The statute, as it seems to me, can only mean that the person who has received the income shall be taxed, but that the amount of the tax shall depend on the income received in the second preceding year.

I think that the language of the statute of 1929 was ineffective to accomplish a purpose which was probably intended by its promoters, and, with the highest respect for the opinion of Judge Denton, I think that the situation still remains exactly as indicated by Smith, J., in *Sifton v. City of Toronto*, [1929] S.C.R. 484, at p. 488:—

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"The income to be assessed is still the income for the current year, to be fixed at the amount of the previous year's income."

To hold in accordance with the respondent corporation's contention, involves a conclusion that the income which was received by Sir Edward in 1928 is actually and physically located as an entity within the municipality of Toronto, when in 1930 the assessment made in 1929 is adopted by the council, and the tax levied; for only ratable property *within the municipality* is liable to be taxed.

Then, in so far as it relates to income tax, what is the jurisdiction of the council when adopting, in 1930, the assessment roll prepared in 1929?

The act of the council in 1930 when it passes its by-law adopting the assessment roll prepared in 1929, is the act which then for the first time creates an assessment roll binding on the rate-payers, for until the by-law adopting it is passed the council is at liberty to abandon the 1929 assessment and prepare a new roll in 1930, as was formerly the general practice.

I refer to this in order to emphasise the fact that the by-law passed by the council in 1930 is the act of assessment for 1930. And hence the council can validly adopt in 1930, as ratable property, only that which in 1930 it is empowered to tax.

I agree with my brother Orde that the meaning of sec. 10, when read in the light of the other provisions of the Assessment Act, is that you must assess the person who receives the income. There must be the conjunction of a living person residing in the municipality and the receipt of income by such person. If either element is lacking, there is no power to assess. Sir Edward, who received the 1928 income, was not assessable, being dead, and no longer resident in Toronto, and his executors are not assessable, for they never received any income in 1928. Even if the names of the executors were to be entered on the roll, the conclusive statutory measure of income to be assessed against them is *nil*.

At the date of Sir Edward's death, the 12th August, 1929, the assessment roll for 1929 had not yet come into existence. Even if it had been completed and returned, it would not have imposed any liability on him, for under sec. 60, subsec. 5, the assessment made in 1929 *may be adopted* by the council of 1930 as the assessment on which the rate of taxation for 1930 shall be fixed and levied.

But, unless and until it is so adopted, it imposes not even an inchoate liability on any ratepayer. Thus in regard to municipal taxes for 1930, Sir Edward was, at the time of his death, under no

legal obligation, inchoate or otherwise, which his executors could inherit.

Then do the words of sec. 1(l) empower and require the assessing tribunal to impose on the executors personally a new obligation, viz., a tax for which Sir Edward had never become liable?

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The words of sec. 1(l) are:—

“ ‘Person’ shall include . . . the executors . . . of a person to whom the context can apply according to law.”

Now, when the word “person” occurs in sec. 10(1)(a), it means Sir Edward Kemp. He is the person who received the income of 1928 and who, if living, would have been liable for income tax under this section.

But Sir Edward Kemp was dead before the assessment took place, and so was not a person to whom the context of sec. 10(1)(a) can apply according to law, because it applies only to persons living in the municipality at the date of the assessment.

As Sir Edward Kemp was not in October, 1929, a “person” within the meaning of sec. 10, the context of that section cannot apply to him according to law. But under the interpretation section it is the executors only of “a person to whom the context can apply” according to law who stand in the shoes of the testator. Sir Edward was not such a person, and so his executors cannot be assessed.

Though Sir Edward Kemp had in 1928 received the income in question, that imposed on him no obligation to the municipal corporation of Toronto, for, as is illustrated by the *Sifton* case, if he had during 1929 changed his residence to another municipality, the council could not have taxed him in 1930, though his name appeared on the 1929 assessment roll.

Does then the fact that he is removed from the municipality by death, instead of by volition, increase the jurisdiction of the council and enable it to levy this tax on his executors personally? If, as I think, this income tax is a tax *in personam* and not *in rem*, I find no adequate authority in the statute for the respondent corporation’s contention.

Closely connected with the grounds which I have last discussed is the question whether the executors can be assessed in view of the definition of income contained in sec. 1(e) of the Assessment Act:—

“ ‘Income’ shall mean the profit or gain . . . directly or indirectly received by a person from any office or employment, or from any profession or calling or from any trade, manufacture or business, as the case may be.”

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No income of such a description has been received by these executors.

How, then, can they be personally assessed for it? For it is not the corpus of the estate in their hands, but the executors themselves, who are to be assessed—otherwise the taxation would be *ultra vires* as an indirect tax. I observe further in the same connection that the liability of executors for income tax derived by them is specifically dealt with by secs. 12 and 13 of the Assessment Act, as amended in 1929; and the maxim "*Mentio unius exclusio alterius*" applies.

Bearing in mind the principle first noted above, that the tax must be expressly imposed and the power to assess expressly given, these reasons lead me to the conclusion that the Assessment Act omits to make any effective provision for the entry of the names of the executors of Sir Edward Kemp on the municipal assessment roll of Toronto for 1929, for income tax, and fails to empower or authorise the assessing tribunals so to assess them.

I proceed to consider the application to the facts of this case of the second principle noted above, viz., that the municipal council is not empowered or authorised to levy in 1930 an income tax on these appellants, and that not being taxable they are not assessable. Whether the executors of Sir Edward Kemp are or are not taxable in respect of the income here in question depends on the extent of the authority to levy a tax which the Legislature has conferred on the council representing the municipality. For it is elementary that the council can levy the rate only on such persons and in respect of such property as it is empowered by the statute to tax.

In *Sifton v. City of Toronto* (1929), 63 O.L.R. 397, at p. 403, Magee, J.A., says:—

"What was intended by the Legislature was that the city council might adopt the roll (prepared in 1923) instead of making a fresh assessment against those persons or properties liable to pay, but took the risk of invalidity of the roll in 1923 as against persons whom it could not assess" (*quare*, tax?)—"who might be dead or in China."

As Sifton had removed his residence from Toronto in 1923, Magee, J.A., thought the attempted taxation invalid, agreeing with Hodgins, J.A., and their opinion was upheld by the unanimous judgment of the Supreme Court of Canada, [1929] S.C.R. 484. It was there determined that the income of Sifton was not taxable by Toronto in 1924. For, though his name appeared on the assessment roll of 1923, which had been adopted in 1924 without amendment as the basis of taxation for that year, yet

the council had no jurisdiction to levy a tax on him, because he had ceased to have a residence in Toronto in December, 1923, and in consequence the assessment, though right when made, had become invalid before the adoption of the roll in 1924. The decision thus establishes the rule that, if the person or the property is not taxable, the fact that the name of the person or the property appears on the assessment roll and on the collector's roll is an error immaterial and ineffective to create liability to taxation.

If non-taxability develops before the assessment roll is completed and settled, the name or the property should not appear on the roll: *Re Bayack*, 64 O.L.R. 14.

A consideration of the taxing authority which the Legislature has conferred on municipalities thus becomes essential to the determination of this appeal. The only authority of the municipal council to levy taxes is found in sec. 306(1) of the Municipal Act:—

"The council of every municipality shall in each year assess and levy on the whole ratable property within the municipality, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year."

And sec. 258(1) enacts:—

"Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law."

Section 307 provides:—

"(2) One by-law or several by-laws for assessing and levying the rates may be passed as the council may deem expedient."

The meaning of the words "assess" and "levy," as employed in an Act respecting assessment and taxation, is referred to by Fitzpatrick, C.J., in *Nova Scotia Car Works v. City of Halifax* (1913), 47 Can. S.C.R. 406, at p. 414, where he says: "To 'assess' means to consider and determine the whole amount necessary to be raised by rate," citing *Mogg v. Clark* (1885), 16 Q.B.D. 79, at p. 82.

Mogg v. Clark related to the qualification of a vestryman under the Metropolitan Management Act, 1855, sec. 6 of which Act provided that the vestry was to consist of persons rated or assessed to the relief of the poor, and at p. 82 Lord Esher says:—

"Perhaps a person can be 'assessed' without being 'rated;' but if he acts as a member of a vestry, he will be within the penal clause of sec. 54, although he is assessed, unless he is also rated. The words 'rated' and 'assessed' both apply to the person and to nothing else. But is it possible to be 'rated' without being 'assessed'? The overseers assess the amount of the rate for the whole parish, that is, they consider what is the amount wanted

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App. Div. for the whole parish: this they 'assess.' Then they fix the amount
1930. to be paid by each occupier, so that he also is 'assessed.' He is
afterwards put into the rate book, and then he may be said to be
RE KEMP 'rated.' He cannot be 'rated' until he is 'assessed,' he cannot be
AND CITY OF 'rated' without being 'assessed.' Although there may be different
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A different meaning was ascribed to the term "assess" in the case of *City of Ottawa v. Nantel*, 51 O.L.R. 269, at p. 277, and at p. 274, though it is to be observed that there the collocation of words under consideration was not identical with the words of sec. 306.

Whether the term "assess," as used in sec. 306, has reference only to the fixing of the total sum which must be raised, or includes as well the apportionment of a certain part of that total against each particular ratepayer, it is manifest that the proceeding by which the council in 1930 adopts the assessment roll which was prepared and settled in 1929, fixes the total sum to be raised for the year, computes the rate, and directs the levy in accordance with that rate, is in reality one single proceeding on the part of the council, whether it is embodied in one or in more than one by-law, and it is essential to the valid exercise by the council of this function that there should be compliance with all the requirements and limitations prescribed both by the Municipal Act and by the Assessment Act. The essential requirements and limitations so prescribed seem to be as follows:—

(1) The adoption of the roll of the previous year and the assessment and levy by the council of the municipality must take place in the same year. "The council . . . shall in each year assess and levy" (Municipal Act, sec. 306(1)); and if the assessment roll prepared in 1929 is to form the basis for taxation in 1930 it must be adopted by a by-law of the council passed in 1930: Assessment Act, sec. 60(5).

(2) The authority of the municipal council to adopt, assess, and levy in any year is limited to the *ratable property* then within the municipality.

The levy is to be on the whole ratable property within the municipality (Municipal Act, sec. 306(1)), and the jurisdiction of every council is confined to the municipality it represents (Municipal Act, sec. 258(1)).

(3) For reasons heretofore stated in the discussion of the Assessment Act, income tax is a tax *in personam*, i.e., on the person who has theretofore received an income.

(4) The person taxed must be at the time of taxation a resi-

dent of the municipality in which he is taxed (Assessment Act, sec. 11(1)).

(5) The levy must be made in 1930 on the ratable property within the municipality in that year (Municipal Act, sec. 306(1)).

(6) The amount of the ratable property so to be taxed is the amount for which the "person" has been assessed in 1929: *Re Gibson and City of Hamilton*, 45 O.L.R. 458.

(7) The sum so to be entered on the assessment roll of 1929 is the amount of income received by the "person" taxed during the year ending on the 31st December, 1928.

(8) Income becomes "ratable property" within the municipality in 1930 only if the very person who received an income in 1928 resides in the municipality in 1930: *Sifton v. City of Toronto*, 63 O.L.R. 397, [1929] S.C.R. 484.

(9) The authority of the council to impose an income tax is confined to what is conferred on it by sec. 306 of the Municipal Act, and no authority is conferred to substitute the executors of Sir Edward Kemp for Sir Edward himself.

(10) The result is that the council has no power to levy an income tax on the executors of Sir Edward Kemp in respect of the income received by him in 1928.

(11) As there is no power to impose such a task, the executors cannot be entered on the roll as assessable in respect of the 1928 income.

I should only add that I desire to state my respectful agreement with the interpretation of sec. 98(3) of the Assessment Act as expressed by Hodgins, J.A., in *Sifton v. City of Toronto*, 63 O.L.R. at p. 405, and with the confirmation of that view by the Supreme Court of Canada, Smith, J., at p. 488 of [1929] S.C.R.

The conclusions which I have expressed seem to me to accord with the judgment of the Chief Justice of Ontario in *Re Gibson and City of Hamilton*, 45 O.L.R. 458, at p. 461, and with the observations of Anglin, J. (as he then was), and of Duff, J., in *McLeod v. City of Windsor*, [1923] S.C.R. 696, which I have carefully considered, but to which it is unnecessary more particularly to refer.

As this appeal falls to be determined on the interpretation and construction of the Acts respecting assessment and taxation, it may not be strictly relevant to discuss the effect of the varying contentions of the appellants and the respondent corporation. Nevertheless, before parting with the case, I desire to make certain observations regarding the results which would accrue from the differing contentions.

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Sir Edward Kemp paid his taxes for the year 1928. It is true that the quantum of that payment was based on his income for 1926, for which he was entered on the roll in 1927 and taxed in 1928, and he paid his taxes in 1929 based on his income for 1927 and the entry on the roll in 1928, and I assume that in every year preceding 1928 he had paid his taxes. His income tax was therefore paid at the time of his death down to the 31st December, 1929.

If now his executors are made liable to pay in 1930 an income tax on his 1928 income and in 1931 an income tax based on the income he received prior to his death in August, 1929, the city corporation will be receiving income taxes for a period of one year and seven months after Sir Edward's death, and at the same time, under the provisions of sec. 12 of the Assessment Act (as amended in 1929) the executors will be assessed from the date of his death in August, 1929, on the income from so much of his estate as is not distributed to persons within the jurisdiction, and all beneficiaries who are within the jurisdiction will be liable for income tax on the sums received by them. Thus the income of the estate will be taxed twice.

On the other hand, if the present assessment is vacated, the income tax will have been paid by Sir Edward down to the 31st December, 1929, and the executors and beneficiaries will pay, under sec. 12, on the income of the estate from the date of Sir Edward's death.

If the construction of the provisions of the Assessment Act is doubtful or ambiguous, these results may have a bearing on the interpretation which is to be preferred—and, when coupled with the recognised principle that a taxing statute is to be strictly construed, I am led to the conclusion, for the various reasons I have endeavoured to state, that the Assessment Act does not authorise the assessment here appealed against, and that the question asked in the present case should be answered in the negative.

With regard to the *Baskerville* case on which reliance was placed in the Court below, I agree, for the reasons stated by my brother Orde, that it does not stand in the way of the conclusion at which I have arrived.

I would allow the appeal with costs, and answer the question in the negative.

SCHEDULE A TO THE FOREGOING JUDGMENT (containing the statutory provisions therein considered):—

The Municipal Act, R.S.O. 1927, ch. 233, secs.:—

258.—(1) Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law.

306.—(1) The council of every municipality shall in each year assess and levy on the whole ratable property within the municipality, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year, but shall not assess and levy in any year more than two and a half cents in the dollar on the assessed value of such property according to the last revised assessment roll, exclusive of school and local improvement rates and exclusive of any rate not exceeding two mills in the dollar for granting aid to public hospitals for the purposes mentioned in paragraph 28 of section 396.

307.—(2) One by-law or several by-laws for assessing and levying the rates may be passed as the council may deem expedient.

The Assessment Act, R.S.O. 1927, ch. 238, secs.:—

1 (e). "Income" shall mean the profit or gain or gratuity, wages, salary, bonus or commission, or other fixed amount, or fees or emoluments, or profits from a trade or commercial or financial or other business or calling directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source.

1 (I). "Person" shall include any partnership, any body corporate or politic, any agent or trustee, and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law.

4. All real property in Ontario and all income derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation, subject to the following exemptions. (The exemptions have no application to this appeal).

10.—(1) Subject to the exemptions provided for in sections 4 and 9:

(a) Every person not liable to business assessment under section 9 shall be assessed in respect of income.....

(2) The income to be assessed shall be the amount of the income received during the year ending on the 31st of December then last past.

By the statute of 1929, subsec. 2 was amended as follows:—

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"The income to be assessed shall be the income received during the year ending on the 31st of December then last past."

11.—(1) Subject to subsection 6 of section 40 every person assessable in respect of income under section 10 shall be so assessed in the municipality in which he resides either at his place of residence or at his office or place of business.

Sections 12 and 13 of the Assessment Act, as amended in 1929:—

12.—(1) The income of money invested in Ontario by a person resident out of Ontario and the income of money invested by such a person through an agent or trustee resident within Ontario shall not be assessed.

(2) Subject to subsection 1 the income of every estate or trust fund held by executors or administrators, trustees or agents shall, when the person beneficially entitled is resident out of Ontario, be assessed in the hands of such executors, administrators, trustees or agents who may pay the amount of taxes out of the income in their hands.

(3) Any executor, administrator, trustee or agent failing to pay the income tax thereon out of the trust fund shall be personally liable therefor.

(4) Income received by an executor, administrator, trustee or agent which is not distributable annually but is accumulated shall be liable to assessment from year to year but shall not be liable to be again assessed when the accumulated fund is distributed.

(5) An assessment under this section shall be made at the place of the residence of the testator at the time of his death or of the settlor at the date of the settlement, or, if this is not within Ontario, where the trustee or agent resides, or, if there be more than one, where the chief business of the trust is carried on.

24.—(1) (i) No assessment shall be made against the name of any deceased person, but when the assessor is unable to ascertain the name of the person who should be assessed in lieu of the deceased person, he may enter instead of such name, the words, "Representatives of A.B., deceased (*giving the name of such deceased person*)."

57.—(2) If at any time during the year in which an assessment has been made and taxes levied on that assessment in the same year or, if at any time during the year in which an assessment has been adopted under the provisions of sections 59 or 60, it appears to any assessor or any officer of the municipality that any income or business assessment has been omitted from such assessment roll either in whole or in part or that the amount

thereof has been incorrectly stated, he shall forthwith report the same to the clerk of the municipality who shall forthwith enter the same on the assessment and collector's rolls for the current year and the party so assessed and taxed shall have the right of appeal as provided in section 121.

60.—(5) The assessment so made and completed may be adopted by the council of the following year as the assessment on which the rate of taxation for such following year shall be fixed and levied, and the taxes for such following year shall in such case be fixed and levied upon the said assessment.

85. Upon an appeal upon any ground against an assessment the judge of the county court or the Railway and Municipal Board hearing an appeal under section 83, or a Divisional Court, as the case may be, may reopen the whole question of the assessment, so that omissions from, or errors in, the assessment roll may be corrected, and the accurate amount for which the assessment should be made, and the person or persons who should be assessed therefor may be placed upon the roll by such Judge, Board or Court, and, if necessary, the roll of any particular ward or subdivision of the municipality, even if returned as finally revised, may be opened so as to make the same correct in accordance with the findings of such Judge, Board or Court."

86. It is hereby declared that the court of revision, the county judge, the Railway and Municipal Board, and every court to which and every judge to whom an appeal lies under this Act have jurisdiction to determine not only the amount of any assessment, but also all questions as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment.

98.—(1) The taxes payable by any person may be recovered with interest and costs, as a debt due to the municipality; in which case the production of a copy of so much of the collector's roll as relates to the taxes payable by such person, purporting to be certified as a true copy by the clerk of the municipality, shall be *prima facie* evidence of the debt.....

(3) Subject to the provisions of section 121 every person assessed in respect of business or income upon any assessment roll which has been revised by the court of revision or county judge shall be liable for any rates which may be levied upon such assessment roll notwithstanding the death or the removal from the municipality of the person assessed or that the assessment roll had not been adopted by the council of the municipality until the following year.

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ORDE, J.A.:—Sir Albert Edward Kemp, a resident of Toronto, died on the 12th August, 1929. The appellants were granted probate of his will on the 18th October, 1929.

The deceased had made an income return to the assessment commissioner on the 8th February, 1929, but, as he died before the completion of the roll, the commissioner entered in the roll, instead of the name of the deceased, the words "Representatives of Sir Albert E. Kemp, deceased," and assessed them for \$365,120 in respect of income. Paragraph (i) of sec. 24 (1) of the Assessment Act, R.S.O. 1927, ch. 238, provides that in preparing the assessment roll "no assessment shall be made against the name of any deceased person, but when the assessor is unable to ascertain the name of the person who should be assessed in lieu of the deceased person, he may enter instead of such name, the words "Representatives of A.B., deceased."

The learned County Court Judge has held that this constituted a valid assessment against the executors for the year 1929 in respect of the income received by the testator during the year 1928. From that ruling the executors now appeal by way of a special case stated under the provisions of sec. 84 of the Assessment Act.

It may be helpful in understanding the reasons for my conclusions, and particularly as to the application of the judgment of this Court in the *Baskerville* case to which reference will be made, if I set out seriatim the successive changes in the recent methods of assessing income, as I understand them.

1. Prior to 1922, the legislative authority to tax income directly was embodied in sec. 11 of the Assessment Act, R.S.O. 1914, ch. 195. That section did not provide expressly that the income to be assessed should be the income for the current year, that is, for the year in which the assessment was to be made. But that that was the intention is plain, because subsec. 2 provided that where the income was not a salary or other fixed amount capable of being estimated for the current year, the income for the purposes of assessment should be taken as not less than the amount of the income for the preceding calendar year. Any doubt as to this was removed by the addition of sec. 19a in 1920, by 10 & 11 Geo. V. ch. 63, sec. 5. That section made it clear that the return required by sec. 18 of the Assessment Act should shew the "total income from all sources during the current year," such income to be ascertained as provided by sec. 11. But upon whatever basis the calculation was made the income assessed was that for the year in which the assessment was made.

2. In 1922 (by 12 & 13 Geo. V. ch. 78, sec. 11), sec. 11 of the Assessment Act was amended by repealing subsec. 2 and substituting the words, "The income to be assessed shall be the amount of

the income received during the year ending on the 31st of December then last past." This had the effect of removing the distinction between the two methods of computation, one where the income for the current year was so fixed as to be capable of being estimated, the other where the income for the current year had to be calculated upon the basis of that of the preceding year. But the income to be assessed under this amendment still remained that of the current year, as was determined by this Court in *Re Donald Mason & Co.*, 61 O.L.R. 350. No further change was made in this respect up to the revision of 1927, sec. 10 of the Assessment Act as then revised being the same as sec. 11 of the Act of 1911 as amended in 1922.

3. The amendment of 1929 effected a further change. By sec. 1 of 19 Geo. V. ch. 63, the words "the amount of" in subsec. 2 of sec. 10 of the Act were struck out, so that the subsection thereafter read: "(2) The income to be assessed shall be the income received during the year ending on the 31st of December then last past." It was no longer to be the income for the current year, but that of the preceding year, that was to be assessed. And the result unquestionably is that in effecting the transition from the former system to the new one there will have been throughout this Province, technically, a double assessment during a period of two successive years of the income for the same year.

I do not think it is necessary to review in detail the legislative changes in the law as to the assessment of executors, etc., in respect of income received by them in their representative or fiduciary character. Some of the changes in the law as it stood in 1914 were made in order to overcome the effect of the judgment in *Re McLeod and City of Windsor* (1925), 57 O.L.R. 15, as to the constitutionality of the provision for the taxation of income so received on behalf of persons not residing in the Province, and others because of the judgment in the *Donald Mason & Co.* case, already mentioned.

The income in respect of which the city corporation seeks to assess the executors of Sir Edward Kemp is that received by him in his lifetime during the year 1928. Had he been assessed in 1929 for his 1928 income, and the assessment roll been completed and revised before his death, then different considerations would arise. A liability to pay income tax in respect of his income would have attached during his lifetime in such a way as probably to subject his estate to liability for the subsequent taxes levied in respect of such assessment, by virtue of subsec. 3 of sec. 98 of the Assessment Act.

But that is not what happened. No assessment was made

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against him in 1929 for the 1928 income. His death before the completion of the roll made that impossible. Finding it impossible, the city corporation now attempts to assess his executors, not in respect of any income which they themselves have ever received, but in respect of income which was received by their testator.

Where is there any authority in the Assessment Act for this? I cannot find it. It is quite clear that the power to assess personal representatives as such under secs. 12 and 13 of the Act, either as they stood before 1929 or as they now stand, is limited to income which has come to their hands for or on behalf of non-residents.

Nowhere else in the Act is there any provision which justifies the assessment of legal personal representatives for income received by the deceased person whose estates they represent. I think I am safe in saying that under the scheme of the Act, in so far as it relates to the assessment of income, there must be a coincidence of the income assessed and the person assessed in respect thereof. The Act provides no means of assessing income except in conjunction with some person, and the person assessed must have actually received the income in respect of which he is assessed. Counsel for the city corporation relied upon the definition of the word "person" in para. (1) of sec. 1: "'person' shall include any partnership, any body corporate or politic, any agent or trustee, and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law."

I must confess that I do not understand just what the second part of this definition is intended to mean. Mr. Geary applies it to para. (a) of sec. 10 of the Act, so as to make it read, "Every person *including the heirs, executors, administrators or other legal representatives of such person . . .* shall be assessed in respect of income," the italicised words being those he would introduce. This suggestion at first blush seems rather a plausible one, but when the effect of it is examined it will be found to infringe what has been called "the valuable rule never to enact under the guise of definition:" Craies on Statute Law, 3rd ed. (1923), p. 191. Of course, if the definition were so worded as to make the suggested application of it imperative, it would have to be so applied even though the valuable rule just mentioned were thereby infringed. But the application of the definition in the way suggested is fallacious. The primary purpose of a definition of this character is in effect to substitute, for the expression itself, some other expression which might not otherwise be included within the meaning of the defined expression, and so make the statutory provision apply to something to which it would not or might not apply otherwise.

But it is one thing to substitute another expression for the defined expression and quite another so to apply the definition as to couple the defined expression and the substituted expression together in such a way as to make the legislation operative in the particular circumstances, when, if read with one or other expression omitted, it could have no application. In other words, if an interpretation clause says that when the word "A" is used it shall be deemed to extend to and include "B," then when you find "A" used you may read it, the context permitting, as if "A" meant "B," but when applying the legislation to a particular case you are not justified in reading it as if "A" meant both "A" and "B" at the same time.

That is what is attempted here by Mr. Geary's argument. He is not substituting the word "executors" for the word "person," but he is seeking by combining the word "person" and the word "executors" to make sec. 10(a) apply to a combination of circumstances of which one factor, namely, the income to be taxed, is referable to the "person" only, and the other factor, namely, the personal liability in respect of the assessment, is referable to the "executors" only. To accede to this argument would, in my opinion, be enacting "under the guise of definition."

Mr. Geary also referred to sec. 24(1), which sets out the duties of assessors when preparing the assessment roll and to para. (i) thereof as to deceased persons. If this were a provision dealing solely with income assessment it might have some bearing upon the question now before us. But the duties of the assessor defined by this section cover a wide range of things, including not only information as to things to be assessed, whether land or income or business, but numerous other items of information required by the municipality such as the age and occupation and status of the person assessed, the persons in his family, religion, births and deaths, number of dogs, etc., etc. And it is to be observed that para. (i) is grouped with several other paragraphs which relate solely to the assessment of land. There is nothing in para. (i), standing where it does, which can be construed as giving power, not found elsewhere in the Act, to assess one person, in whatever character it is sought to fasten liability upon him, in respect to income which came to the hands of another.

Counsel for the city argued that we were bound by our own unreported decision in *Re Baskerville and City of Ottawa* on the 21st January, 1929. That was an appeal by the executrix of the will of one Baskerville upon a case stated by a County Court Judge, and the appeal was dismissed at the conclusion of the argument. Whatever reasons were then given were very short and were not recorded. The circumstances were these. The

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deceased had died in September, 1926. He had been assessed during his lifetime in 1926 in respect of his income for that year, based, as the statute required that it should be, not being a salary or a fixed amount capable of being estimated, upon the income received by him in 1926. Of the income for 1926, which, had he lived during the whole year, would have been received by himself, part was received by him prior to his death and the balance came to the hands of his executrix. When called upon to make an income return in 1927, which as the law then stood would be in respect of income for 1927, though computed on the basis of the previous year's income, the executrix claimed that she should be assessed only for an amount equal to the income which she had received between the date of her husband's death in September, 1926, and the end of that year. That amount was clearly less than the amount which, having regard to the estate left by her husband, would almost certainly be received by her during 1927. The city contended that her income for 1927, which was what was being assessed, must be calculated upon the basis of the whole income which the testator and the executrix had together received during the year 1926, and not upon the lesser amount which she alone had received. The County Court Judge gave effect to the city's contention, and we upheld that view, and gave judgment on the spot.

In applying our decision in the *Baskerville* case regard must be had to the question to which we were limited by the special case there stated for our consideration. The executrix raised no question as to whether or not she could be assessed at all in her representative capacity. She admitted her liability to be assessed for something. The legislation then in force was different from that applicable to the present case, and all that we were called upon to determine was the basis for computing the income which she would be deemed to receive during the year then current, namely 1927. Our judgment upon that question can have no bearing upon the question here, which involves the liability of the executors for assessment for income which they themselves never received at all.

I prefer not to deal with the argument that any assessment of the estate in respect of the deceased's income for 1928 would have the technical effect of conferring a double taxation in respect of the income for that year. That argument is applicable to all of us who came within the operation of the old law and the amendment of last year. I base my judgment upon the broad and simple ground that the Assessment Act gives no power to a municipality to create a liability to taxation by means of an assessment of any person in respect of income received by another.

There must be a conjunction of both the person and the income to be assessed.

I would allow the appeal and declare the assessment of the executors invalid. The costs of the executors both here and below should be paid by the city.

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FISHER, J.A.:—The questions for determination all turn on the construction of the Assessment Act of 1927 and the 1929 amendment.

After consideration of the facts—which are not in dispute—and a careful consideration of the relevant sections of the Assessment Act and amendment, I am of the opinion that the learned County Court Judge came to the right conclusion, and I can see no useful purpose in repeating what he has said in his well-considered reasons, other than to make reference to the *Baskerville* case, which counsel for the appellants argued was, because of the 1929 amendment, not now applicable.

The question asked in the *Baskerville* case was whether or not the income received by the testator Baskerville in his lifetime during 1926 should be accounted for with income received by his executrix after his death in the same year, for the purpose of determining the amount for which his estate should be assessed for income upon the assessment roll for the year 1927.

The learned County Court Judge decided that there was a right to assess in the hands of the present representatives the income received by a man who is dead, and this Court was unanimous in confirming that decision, and until that case is reversed we are bound to follow it.

The only change in the Assessment Act, since the *Baskerville* case was decided, is the amendment made in 1929 repealing secs. 12 and 13 of the Assessment Act, and amending subsec. (2) of sec. 10 of the said Act, by striking out the words "the amount of."

Subsection (2) of sec. 10 of the Assessment Act, R.S.O. 1927, ch. 238, reads as follows:—

"(2) The income to be assessed shall be the amount of the income received during the year ending on the 31st of December then last past."

As amended, this section reads as follows:—

"(2) The income to be assessed shall be the income received during the year ending on the 31st of December then last past."

In my opinion, the effect of this change is that the income to be assessed *shall not be deemed to be the amount of the income received during the past year*, but *shall be the income received during the past year*, and I am therefore unable to see how the change made by the amendment of 1929 can affect the question

App. Div. whether or not Mrs. Baskerville could be assessed as executrix.
 1930. I can see nothing in the amendment which causes any difference
 so far as that aspect of the case is concerned.

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I would dismiss the three appeals with costs.

Fisher, J.A.

MASTEN, J.A.:—For the reasons stated in my judgment in the *Kemp* case, which was argued along with the *Wilder* and *Kilmer* cases, I would allow the appeals in these cases with costs and answer in the negative the questions propounded in them.

LATCHFORD, C.J., agreed with MASTEN, J.A.

ORDE, J.A.:—There is no difference so far as the law is concerned between the *Wilder* case and that of Sir Edward *Kemp's* estate. Mr. Wilder died on the 28th May, 1929, having made an income return earlier in the year. The assessment roll was not completed before his death.

For the same reasons as in the *Kemp* case, I would allow the *Wilder* appeal and declare the assessment invalid, with costs to the appellant here and below.

In the *Kilmer* case the result is the same.

Appeals allowed (FISHER, J.A., dissenting).

[APPELLATE DIVISION.]

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REX v. AUGER.

May 9.

Criminal Law—Seduction of Girl under 18 of Previously Chaste Character—Criminal Code, secs. 211, 1002—Evidence—Corroboration of Testimony of Girl.

The prisoner was tried and convicted before a County Court Judge sitting without a jury upon a charge of having unlawfully seduced a girl of previously chaste character and under the age of 18 years, contrary to sec. 211 of the Criminal Code:—

Held, that, under sec. 1002, the evidence of the girl must be corroborated in some material particular by evidence implicating the accused, and that means that there must be corroboration as to commission of the crime and also as to the prisoner's identity or connection with or implication in that commission.

And, there being independent testimony indicating sexual connection by some person with the girl and also independent testimony tending to connect the prisoner with the crime, the conviction was affirmed.

The weight to be attached to the testimony was for the trial Judge, and the evidence was such that had the trial been before a jury the Judge could not have withdrawn the case from the jury.

Review of the authorities.

An appeal by the defendant from his conviction by the Judge of the County Court of the County of Carleton in his Criminal Court of having unlawfully seduced a girl of previously chaste

character and under the age of 18 years, contrary to sec. 211 of the Criminal Code.

April 11. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, J.J.A., and WRIGHT, J.

M. Doctor and *R. A. Hughes*, for the appellant, argued that there was not the corroboration required by sec. 1002 of the Criminal Code to implicate the accused. A number of little facts, any one of which would not amount to corroboration, would not make corroboration. Reference to *Rex v. Baskerville*, [1916] 2 K.B. 658, especially at p. 667, 12 Cr. App. R. 81; *Rex v. Rudge* (1923), 17 Cr. App. R. 113; ; *Hubin v. The King*, [1927] S.C.R. 442; *Rex v. Lovell* (1923), 17 Cr. App. R. 163, especially at p. 169; *Thomas v. Jones*, [1921] 1 K.B. 22, at p. 35; *Regina v. Vahey* (1899), 2 Can. Crim. Cas. 258.

Edward Bayly, K.C., for the Crown, contended that corroboration was in each case a question of fact, and in the present case there was testimony tending to connect the accused with the crime. This was sufficient to sustain the conviction.

May 9. The judgment of the Court was read by LATCHFORD, C.J.:—This appeal is against the conviction on the 4th March, 1930, of one Louis Auger by his Honour E. J. Daly, Judge of the County Court of the County of Carleton, of having unlawfully seduced Laurence Martel, a girl of previously chaste character, of or about the age of 16 years and under the age of 18 years, who was not his wife, an offence contrary to sec. 211 of the Criminal Code, R.S.C. 1927, ch. 36. The sentence, imprisonment for two years, was, by leave, also appealed against, but this phase of the appeal was abandoned.

All the grounds of appeal of which notice had been given were also abandoned with a single exception. This was based on sec. 1002 of the Code, and is as follows: that there was not sufficient "evidence corroborating the evidence of Laurence Martel, the complainant, in some material particular implicating the accused."

Section 1002 of the Criminal Code provides as follows: "No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused."

Included in sections thereunder mentioned is sec. 211 under which this prosecution is brought.

The rules of evidence with regard to corroboration are well settled.

Reference may be made to the words of Lord Reading (then

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Lord Chief Justice) in the leading case of *Rex v. Baskerville*, [1916] 2 K.B. 658. At p. 667 he says: "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it"

It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shews or tends to shew that the story is true, not merely that the crime has been committed, but that it was committed by the accused.

The words are quoted with approval by Mignault, J., in *Steele v. The King* (1924), 42 Can. Crim Cas. 375, at pp. 380, 381, and he adds: "The question for the Court on this appeal, I take it, is not as to the weight or credibility of the corroborative evidence, that was a question for the jury, but whether there was any evidence fit to be left to the jury corroborating the testimony of the girl Rigby in some material particular implicating the accused."

We agree with the statement in 4 C.E.D. (Ont.) at p. 705, where it is said: "According to this rule, there must be corroboration in two areas, that of the commission of the crime, and that of the prisoner's identity, or connection with, or implication in, that commission; and it is not enough that there is confirmation of the witness's story in the first area."

In *Hubin v. The King*, [1927] S.C.R. 442, it is said: "The question . . . whether the record before us contains any evidence within that description on which a jury could find corroboration . . . is a question of law; although . . . whether corroborative inferences should be drawn is a question for the jury;" citing *Rex v. Gray* (1904), 68 J.P. 327.

Bearing in mind the rules as above stated, the Court is unanimously of opinion, after careful consideration of the whole evidence, that there is independent testimony indicating sexual connection by some person with Laurence Martel a girl of previously chaste character aged between 18 and 16, and also that there is some independent testimony tending to connect the prisoner with the crime. The weight to be attached to that testimony was for the trial Judge, but in the unanimous opinion of the Court the evidence is such that had the trial been before a jury the Judge could not have withdrawn the case from the jury.

Appeal dismissed.

[APPELLATE DIVISION.]

LUBOVICH V. CUCKOVICH AND SAMESIA.

1930.

May 9.

Dower—Land Held in Joint Tenancy by Husband and Wife—Consent Judgment in Action for Alimony—Wife Barred of Dower in After-acquired Land—Conveyance by Wife to Husband—Release of all Claims.

In an action for alimony brought by the present plaintiff, a judgment was pronounced in April, 1918, upon consent of both parties, whereby it was adjudged that the plaintiff should deed to the defendant all her interest in any properties owned by the plaintiff and defendant jointly, and the plaintiff, abandoning all claim against the defendant for separate support, should stand debarred of any interest in any property real or personal hereafter acquired by the defendant. At this time the husband and wife were joint tenants of a tract of land, and shortly afterwards the wife executed in favour of the husband a deed of that land in fee simple, wherein she released to him all her claims upon the land. He died in 1927 without having alienated this land, and she brought this action against his executors claiming dower therein:—

Held (RIDDELL, J.A., dissenting), that the plaintiff was, by the consent judgment, barred of any right to dower, inchoate or otherwise, which she might have had in this land, which was acquired by him after the judgment.

Per RIDDELL, J.A.:—The husband, by electing to be seised of the land at the time of his death, made it liable for his wife's dower, and there was nothing in the way of estoppel to bar her right.

AN appeal by the defendants from the judgment of McEvoy, J., at the trial, declaring that the plaintiff is entitled to dower in lands of which her husband was seised at the time of his death.

February 25. The appeal was heard by RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

R. B. Law, for the appellants. The agreement made in the alimony action by which the wife released her interest in her husband's property and the consent judgment in which it is embodied include her inchoate right of dower. It should be interpreted according to the intention of the parties. That intention is to be found in the release of "any interest" in after-acquired property. Reference to *Ford v. Beech* (1848), 17 L.J.Q.B. 114.

The plaintiff, respondent, was not represented.

May 9. MASTEN, J.A.:—In my opinion, this appeal falls to be disposed of entirely upon the construction of the consent judgment of Meredith, C.J.C.P., dated the 22nd April, 1918, which judgment was pronounced in an alimony action, carrying out a settlement and adjustment, as between the plaintiff and defendant therein, of various differences that had arisen between them.

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The judgment reads as follows:—

"1. This action coming on for trial this day before this Court at its sittings holden at Welland for trial of actions without a jury, in the presence of counsel for both parties, upon consent minutes of judgment between solicitors for the parties hereto, this Court doth order and adjudge that the plaintiff *shall* deed to the defendant all her interest in any properties owned by the plaintiff and defendant jointly, and the plaintiff abandons all claim against the defendant for separate support, and the *plaintiff shall stand debarred of any interest in any property real or personal hereafter acquired by the defendant.*

"2. And this Court doth order that the defendant shall pay to the plaintiff the sum of \$1,100 and \$200 for costs, the plaintiff to pay any claim which may be made by Anastacia Chortinsky in respect of maintenance of the plaintiff."

The particular phrase which, in my opinion, governs the rights of the parties in this action is, "the plaintiff shall stand debarred of any interest in any property real or personal hereafter acquired by the defendant." By the judgment it is provided that the plaintiff *shall* in pursuance thereof convey to the husband all her interest in the lands held by them as joint tenants. The interest so to be conveyed to the husband by the wife falls within the description "hereafter acquired," and when so acquired an inchoate right of dower would have attached but for the clause quoted above.

A wife may preclude herself from claiming dower by a contract with the husband during marriage: Halsbury's Laws of England, vol. 24, p. 195, citing *Slatter v. Slatter* (1834), 1 Y. & C. (Ex.) 28.

The right of a woman to dower as well during the life of her husband as after his death, is undoubtedly an interest in real property: *Allen v. Edinburgh Life Assurance Co.* (1877), 25 Gr. 306; *Cassey v. Cassey* (1868), 15 Gr. 399.

As the property in question was acquired by the defendant after the date of the judgment and in pursuance of it, the plaintiff's dower was, in my opinion, barred by the clause above quoted; and the general principles of law with reference to the effect on dower of conveyances from wife to husband are not at all in question.

I would allow the appeal with costs.

ORDE, J.A.:—We are not here dealing with the simple case of a conveyance by a wife to her husband and the question as to its effect upon her right of dower.

It may possibly be that "a wife cannot relinquish her dower in her husband's real estate by executing a release to him," as stated in *Cameron on Dower*, p. 408; but I should want more than the two Ontario cases there cited to satisfy me that that was a correct statement of the law. The two cases, *Ogden v. McArthur* (1875), 36 U.C.R. 246, and *Davisson v. Sage* (1873), 20 Gr. 115, turned upon the difficulties involved at that period in making a conveyance by a husband to his wife or by a wife to her husband.

The rights of the husband and wife here really depend upon the proper interpretation to be given to the judgment in the alimony action, which is quoted in full by my brothers Riddell and Masten.

I think the declaration that "the plaintiff shall stand debarred of any interest in any property real or personal hereafter acquired by the defendant," in the judgment of the 22nd April, 1918, clearly deprives her of any right to dower, whether inchoate or otherwise, in any lands thereafter acquired by her husband.

The learned trial Judge has held that the lands of which the two parties were jointly seised stand in a different category, and that, notwithstanding the positive direction in the judgment that she shall convey all her interest therein to her husband, she still retained an inchoate right to dower therein.

It is clear, of course, that she had no dower in the lands while seised as a joint tenant. She was a joint owner of the whole estate, and the existence of any right to dower was incompatible with her own title. If she predeceased her husband, no dower could attach. If she survived him, the estate was wholly hers.

A conveyance or release by her of her estate to her husband, apart from the judgment, and without some special stipulation or provision to nullify its effect, would doubtless subject her husband's estate in fee to her inchoate right of dower. But we are here dealing with the binding effect of the judgment, and I can see no reason for distinguishing the acquisition by the husband of a complete and unfettered estate in fee in these lands by virtue of his wife's conveyance to him and the acquisition of any other lands by him. She was to "stand debarred of any interest in any property real or personal" thereafter acquired by her husband.

We are not driven to interpret the judgment according to its evident intention, namely, that the husband and his estate are to be thereafter free from any possible claim by the wife. The exclusion of any interest in the wife was in my opinion clearly declared by the judgment.

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The appeal should be allowed and the action dismissed with costs here and below.

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FISHER, J.A., agreed with ORDE, J.A.

RIDDELL, J.A.—This is a somewhat singular case, the facts of which are clear and not in dispute—I had thought the law equally clear, and the argument of appealing counsel has not convinced me that it is not so.

In April, 1918, a judgment was pronounced by consent in an action for alimony, the judgment being formally entered on the 6th May, in the following terms:—

“Between Agnes Lubovich, plaintiff, and Peter Lubovich, defendant.

“1. This action coming on for trial this day before this Court at its sittings holden at Welland for trial of actions without a jury, in the presence of counsel for both parties, upon consent minutes of judgment between solicitors for the parties hereto, this Court doth order and adjudge that the plaintiff shall deed to the defendant all her interest in any properties owned by the plaintiff and defendant jointly, and the plaintiff abandons all claim against the defendant for separate support, and the plaintiff shall stand debarred of any interest in any property real or personal hereafter acquired by the defendant.

“2. And this Court doth order that the defendant shall pay to the plaintiff the sum of \$1,100 and \$200 for costs, the plaintiff to pay any claim which may be made by Anastacia Chortinsky in respect of maintenance of the plaintiff.”

At this time, the husband and wife were joint tenants of a tract of land in the township of Crowland; and, on the 3rd May, the wife executed a deed to the husband of the land in fee simple, wherein she, *inter alia*, released to him “all her claims upon the said lands,” and also covenanted “to execute such further assurances of the said lands as may be requisite.” The husband did not acquire any other lands; he died in February, 1927, without having alienated the lands mentioned. The widow, the plaintiff in this action, claims dower in the said lands; the defendants, who are the executors of the last will and testament of the husband, defend on the ground that she had debarred herself by the judgment of the Court to which she had agreed, and which has been mentioned *supra*.

At the trial at Welland before Mr. Justice McEvoy that learned Judge gave judgment for the plaintiff declaring her entitled to dower in the said lands, and the defendants now appeal.

Of course, had the land remained in joint tenancy, the plaintiff would not be entitled to dower—the Dower Act, R.S.O. 1927, ch. 100, sec. 3—the reason being that she would be entitled to the whole estate, if, as in this case, she was the other joint tenant. So, too, had the husband called upon the wife to execute a bar of dower, another question might have arisen. But here the husband was seemingly satisfied to retain his legal ownership of the land without requiring a bar of his wife's dower.

Our statute is clear as to the rights of a widow in dower; sec. 1 providing that “for her dower shall be assigned to her the third part of all the lands of her husband, whereof he was seised at any time during coverture, except such thereof as he was so seised of in trust for another.” The present does not come under any of the cases in which the dower is barred by statute (sec. 9, *sqq.*); and the simple question is: “Does the judgment or the deed or do they both together bar the dower?” There is no bar by settlement or jointure—as to which see Armour on Devolution, pp. 233, 234—no bar by covenant, schedule B., No. 5, to the Short Forms of Conveyances Act, R.S.O. 1927, ch. 143, not extending so far. I am unable then to see how this land is, *quoad* dower, in any different position from land acquired in any other way; and there is absolutely nothing in the way of estoppel to bar the widow.

It was urged upon us by counsel that the intention of the parties to the settlement of the action for alimony was that the wife was not to claim dower; but we are to interpret that judgment like any other document, by the language employed in it, and not by a guess as to what the parties may have meant; we are wholly in accord that we must interpret it in accordance with the intention of the parties, but that intention we can gather from the language employed alone; that language does not import a bar of dower, and I am of the opinion that the deceased husband, by electing to be seised of the land at the time of his death, thereby made, it liable for the wife's dower.

I think that the appeal should be dismissed, but, as no counsel appeared to oppose, the dismissal should be without costs.

Since the above judgment was written, counsel retained for the respondent has stated that he had intended to be present at the argument, but had not been present by reason of a mistake made by his clerk; he asked to be allowed to put in a written argument, with a view, of course, to being allowed costs if the appeal should be dismissed. For my part, I decline to accede to his request, the failure to attend was in no way due to the appellants, and I am of opinion that the appellants should not be further burdened

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App. Div. with costs, by permitting the lodging of a perfectly useless argu-
 1930. ment; our proceedings are notified to the profession and to the
 LUBOVICH public in the press; and every one interested should be held to
 v. attend if he desires to be heard. There may be cases in which
 CUCKOVICH this general rule may not be followed; but the present is not one
 AND of them.
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Appeal allowed (RIDDELL, J.A., dissenting).

[APPELLATE DIVISION.]

1930.

CARSON v. WILLITTS.

May 9.

Contract—Undertaking to Bore Wells for Oil—Breach—Reference to Assess Damages—Master's Report—Appeal from Allowed—Order Setting aside Report—Further Appeal—Damages Assessed on Wrong Principle—True Measure—Loss of Chance of Discovery of Valuable Oil—Reference back—Refusal of Plaintiff to Accept on First Appeal—Whether Court should Allow Change of Position.

The plaintiff entered into a contract with the defendant whereby, in consideration of a share in certain rights which the plaintiff had acquired, the defendant undertook to bore three wells in a certain territory in order to explore the territory for oil. The defendant bored one well and then refused to bore the other two. In an action for breach of the contract, it was adjudged at the trial that "the plaintiff do recover from the defendant damages," and a reference to a Master to ascertain the quantum of the plaintiff's damages for the defendant's failure to carry out his contract was directed. The Master reported that the plaintiff was entitled to \$2,162, estimating the damages on the footing of what it would cost the plaintiff to put down two additional wells. On appeal from the report, it was held by a Judge in Weekly Court that the Master had proceeded on a wrong principle in assessing the damages. The order made upon the appeal merely allowed the appeal and set aside the Master's findings and report:—

Held, upon appeal from that order to a Divisional Court, that the Master proceeded upon a wrong principle; but (RIDDELL, J.A., dissenting), that the order was erroneous because the judgment at the trial had awarded the plaintiff damages, which meant something more than nominal damages; no appeal from that judgment was taken, and the effect of the order was to reverse it; the order allowing the appeal from the report should stand, but there should be added to it a declaration as to the basis upon which the damages should be assessed.

What the plaintiff lost by the refusal of the defendant to bore two more wells was a sporting or gambling chance that valuable oil or gas would be found when two more wells were bored. It might not be easy to compute what that chance was worth to the plaintiff, but the difficulty in estimating the quantum was no reason for refusing to award any damages; and there should be a declaration accordingly.

Toronto Hockey Club Ltd. v. Arena Gardens of Toronto Ltd., [1926] 4 D.L.R. 1 (Privy Council), and *Haack v. Martin*, [1927] S.C.R. 413, followed.

Per RIDDELL, J.A.:—The Judge who heard the appeal in the Weekly Court offered the plaintiff a reference back, but he declined it, and took part with the defendant in issuing the order in the terms stated above. On the hearing before the Divisional Court, it becoming apparent that the Judge was right in setting aside the report, the plaintiff asked for a reference back. The Court should not allow him to alter his position, deliberately taken, unless it could see that doing so would probably result in benefit to him—and that had not been made to appear. And so the order appealed from should be affirmed.

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AN appeal by the plaintiff from an order of MEREDITH, C.J.C.P., in Weekly Court, allowing the defendant's appeal from the report of a Local Master finding \$2,162 to be the amount of the plaintiff's damages in an action for breach of a contract to bore three oil-wells in lands of which the plaintiff had taken "oil-leases" from the owners.

February 26 and 27. The appeal was heard by RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

G. T. Walsh, K.C., for the appellant, referred to *Kranz v. McCutcheon* (1920), 18 O.W.N. 395.

H. H. Davis, K.C., for the defendant, respondent.

May 9. MASTEN, J.A.:—This is an appeal by the plaintiff from an order of the Chief Justice of the Common Pleas, dated the 22nd June, 1929, allowing the appeal of the defendant from the report of the Local Master at St. Thomas.

The action is for breach of contract. The plaintiff, being the holder of certain contracts from farmers giving him the right to bore for oil on their farms, entered into a contract with the defendant whereby, in consideration of a share in the rights which the plaintiff had acquired, the defendant undertook to bore three wells for the purpose of exploration and exploitation of the territory. He bored one well to a satisfactory depth, and then refused to bore the other two.

At the trial before Kelly, J., the plaintiff succeeded, and the judgment contained, among other provisions, the following terms:—

"2. This Court doth order and adjudge that the plaintiff do recover from the defendant damages.

"3. This Court doth further order and adjudge that it be referred to the Local Master of this Court at St. Thomas to ascertain the quantum of the plaintiff's damages for the defendant's failure to carry out his contract.

"4. This Court doth further order and adjudge that the defendant's counterclaim be dismissed with costs."

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A reference was had, and the Master, by his report, dated the 7th February, 1929, found that the plaintiff was entitled to the sum of \$2,162 for damages.

By his reasons for judgment it appears that he estimated these damages on the footing of what it would cost the plaintiff himself to put down the two additional wells to a depth of 500 feet. On appeal from the report, it was held that the Master proceeded on a wrong principle in assessing the damages as he had done.

I agree that the Master proceeded on a wrong principle. But, instead of declaring the principle on which the damages ought to have been assessed and referring the matter back to the Master for that purpose, the operative part of the order herein appealed reads as follows:—

“2. This Court doth order that the report and findings of the said Local Master be and the same are hereby set aside, and that the appeal of the defendant be and the same is hereby allowed.

“3. And this Court doth further order and direct that the plaintiff do pay to the defendant his costs of this appeal forthwith after taxation thereof.”

Clearly such an order is erroneous, for the judgment at the trial had awarded to the plaintiff damages, which means something more than nominal damages, and no appeal from that judgment has been taken. The effect of the order appealed against is to reverse the trial judgment.

I would therefore allow this appeal as of right, and make the declaration and reference back which ought to have been made in the Court below.

Then what is the basis on which this Court should now direct the damages to be assessed? In my opinion, what the plaintiff lost by the refusal of the defendant to bore two more wells was a sporting or gambling chance that valuable oil or gas would be found when the two further wells were bored. If the wells had been bored and no oil or gas of value had been found, the effect would be that the plaintiff has lost nothing by the refusal of the defendant to go on boring. On the other hand, if valuable oil or gas had been discovered, by the boring of these two wells, he had lost substantially. It may not be easy to compute what that chance was worth to the plaintiff, but the difficulty in estimating the quantum is no reason for refusing to award any damages.

In *Mayne on Damages*, 10th ed., p. 6, it is said:—

“A distinction must be drawn between cases where absence of evidence makes it impossible to assess damages, and cases where

the assessment is difficult because of the nature of the damage proved. In the former case only nominal damages can be recovered. In the latter case, however, the difficulty of assessment is no ground for refusing substantial damages."

In the case of *Toronto Hockey Club v. Arena Gardens of Toronto Ltd.* (1925), 57 O.L.R. 610, the plaintiffs' claim was for damages for having been deprived by the defendant company of their rights under a contract whereby they would have retained the services of a hockey team which they had organised. My brother Orde had heard an appeal from the Master, and in the course of his judgment (1924), 55 O.L.R. 509 at p. 523, he said:—

"The damages must be limited to what the plaintiffs would have reaped from the operation of the team under those contracts during the season of 1918-19."

In the judgment in appeal that statement was not agreed to, because, as it is said in 57 O.L.R. at p. 617, "At the end of the season of 1918-1919 there remained two alternative elements of value, viz., the price at which such an organised team could be sold, and, secondly, the chance or probability that, if not sold, the team or many members of it would remain with the plaintiff company after 1919 and assist in carrying on a profitable enterprise. That chance or probability possessed a pecuniary value to the plaintiffs, and by the action of the defendants that chance was destroyed. It therefore forms a ground upon which the plaintiffs are entitled to recover damages, as is shewn by the case of *Chaplin v. Hicks*, [1911] 2 K.B. 786."

That judgment was appealed to the Privy Council, and in the course of the judgment of the Board delivered by Lord Warrington upon the appeal, *Toronto Hockey Club Ltd. v. Arena Gardens of Toronto Ltd.*, [1926] 4 D.L.R. 1, at p. 4, it is said:—

"But it is contended that although the Master's award cannot stand, the award of Orde, J., confirmed by the Court of Appeal, erred on the other side by being too small a sum.

"In their Lordships' opinion this contention fails. They cannot find that Orde, J., or the Court of Appeal acted on any wrong principle. The amount of damages in such a case as the present cannot be ascertained by any precise means, it must be more or less guess-work. Orde, J., in their Lordships' opinion, and the Court of Appeal still more clearly, based their conclusions on what they thought to be the value of the services of the team of which the plaintiffs had been deprived."

To the like effect and adopting the same principle is the judgment of the Supreme Court of Canada in *Haack v. Martin*, [1927] S.C.R. 413, at p. 419.

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We are informed by counsel that in the Court below the plaintiff was offered by the Court the right, if so advised, to have a reference back to the Master. The plaintiff did not accept that offer but instead accepted an order allowing the appeal *simpliciter*, and then served his notice of appeal to this Court, seeking to restore the Master's report, in which effort he failed. Having regard to the course so pursued, I think that, though the plaintiff secures some success on this appeal, he is not entitled to any costs.

I would allow the appeal and amend and supplement the order below so that it shall provide as follows:—

(1) The order below is affirmed in so far as it sets aside the Master's report.

(2) Declare that the plaintiff is entitled to recover from the defendant damages for the loss of the chance that valuable oil or gas might have been discovered if the defendant had fulfilled his contract by boring two more wells.

(3) Refer it to the Master to inquire and report the amount of the said damages suffered by the plaintiff in consequence of the defendant's breach of contract.

(4) No costs of this appeal to either party.

ORDE and FISHER, JJ.A., agreed with MASTEN, J.A.

RIDDELL, J.A.:—This is a somewhat novel case: the parties entered into an agreement that the defendant should put down certain oil-wells on the "leases" of the plaintiff, receiving a conveyance of a half interest from the plaintiff—there were other terms in the contract which I do not set out, as they have no bearing on this judgment. The defendant, as the plaintiff alleges, failed to carry out his contract and the plaintiff brought this action. At the trial, before Mr. Justice Kelly, that learned Judge found in favour of the plaintiff; and judgment was entered in the following terms:—

"2. This Court doth order and adjudge that the plaintiff do recover from the defendant damages.

"3. This Court doth further order and adjudge that it be referred to the Local Master of this Court at St. Thomas to ascertain the quantum of the plaintiff's damages for the defendant's failure to carry out his contract.

"4. This Court doth further order and adjudge that the defendant's counterclaim be dismissed with costs.

"5. This Court doth further order and adjudge that all other costs (of the action and of the reference) and further directions be reserved until after the Master's report."

A reference was had to the Local Master, and a report made fixing the damages at \$2,162; the defendant appealed on several grounds, and, upon the appeal being heard by the Chief Justice of the Common Pleas, that learned Judge, considering that there was no evidence to justify the findings of the Master, directed that the report should be set aside, but gave the plaintiff the right, if so advised, to have a reference back to the Master. Instead of accepting this reference back, the plaintiff took part with the defendant in issuing an order in the following terms:—

"2. This Court doth order that the report and findings of the said Local Master be and the same are hereby set aside, and that the appeal of the defendant be and the same is hereby allowed.

"3. And this Court doth further order and direct that the plaintiff do pay to the defendant his costs of this appeal forthwith after taxation thereof."

The plaintiff then served notice of appeal to this Court:—

"Take notice that the plaintiff appeals to a Divisional Court from the judgment pronounced by the Honourable the Chief Justice of the Common Pleas on the 22nd day of June, 1929, allowing the appeal of the defendant from the report of the Local Master of the Supreme Court at St. Thomas, Ontario, dated the 26th day of December, 1928, upon the following grounds:—

"1. The learned Chief Justice erred in holding that the learned Local Master had proceeded on a wrong principle in awarding the plaintiff damages for \$2,162.

"2. The learned Chief Justice erred in holding that the plaintiff was not entitled to damages until he had completed the wells referred to in the contract between the plaintiff and the defendant.

"3. The learned Chief Justice failed to give effect to the contract between the defendant and the plaintiff, and to the evidence adduced on the reference before the learned Local Master.

"4. The said judgment is contrary to law, evidence, and the weight of evidence."

It will be observed that there is no dismissal of the action, and there is no interference with the original judgment, but the sole effect of the order of the learned Chief Justice is to set aside the report of the Master.

On the hearing before us, it was almost at once apparent that the report could not stand, and that the Chief Justice was right in setting it aside; the appeal, of course, is not against the reasons for the judgment, but against the judgment itself and nothing else. Had a reference back been accepted, there is nothing in the judgment to hamper or embarrass the plaintiff, and, technically, the only matter we have to pass upon is whether the report should

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App Div. stand. We are all of opinion that it cannot; and, indeed, this is
 1930. scarcely disputed.

CARSON But, this becoming apparent, counsel for the appeal asked
 v. that he might have a reference back—this although he had de-
 WILLITS. clined it when offered it. It is plain that, technically, the Court
 Riddell, J.A. could not allow him to alter his position deliberately taken; but
 the Court does not consider itself absolutely bound by any prac-
 tice, however venerable and well-settled, if by following it mani-
 fest injustice would result. It should, however, not deviate from
 a well-established practice, unless it can see that such deviation
 will probably result in benefit to the litigant.

No such benefit has been made to appear and I can find none
 —the order appealed from should be affirmed and the appeal
 dismissed with costs. I have not considered and offer no opinion
 as to what, if any, relief can be given under the reservation con-
 tained in the original judgment. The objection was made that
 this is an interlocutory motion—this I have not considered, as
 the result would be the same.

Order below varied (RIDDELL, J.A., dissenting).

[APPELLATE DIVISION.]

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May 9.

*Landlord and Tenant—Lease of Hotel Premises—Conditions—Alleged
 Violation by Tenants—Failing to Keep Main Building Open in
 Winter—Absence of Complaint—Estoppel—Construction of Clause
 in Lease—Guarantee-deposit by Tenants—Return of—"Inn."*

The defendant, the owner of certain hotel properties, on the 14th May, 1927, by an agreement in writing leased to the plaintiffs these properties for one year from that date. The properties were described in the agreement as the "Brant Inn," the "Annex," and the "cot-tage and garage." The agreement contained the following clause: "It is further understood and agreed that the lessees . . . will continually conduct and carry on the business of a high-class inn, to reasonably meet the requirements of its patronage, and will use every reasonable means to secure all business possible for the success of the business." As a guarantee for the performance of all conditions of the lease, the plaintiffs deposited with the defendant \$2,500. At the conclusion of the year, the plaintiffs demanded the return of the \$2,500, alleging that all conditions had been duly performed, and, upon the defendant's refusal, brought this action for the money. The defendant set up as a defence a violation of the terms of the lease in that the plaintiff had on the 4th December, 1927, closed the Brant Inn, ceasing to do business, and the building remained closed until the 15th March, with the exception of three occasions when the dance-hall in the inn was opened for parties. The plaintiffs did not deny the closing of the main building, but alleged

that the Annex was kept open continuously, while, as had always been the custom, the main building was closed during the winter months. The defendant did not during the term complain of the closing of the main building, and in a letter to the plaintiffs recognised that he expected that the water-pipes would be shut off and the water drained in the main building. There was no evidence that the defendant lost anything by the closing:—

Held (FISHER, J.A., dissenting), that the agreement meant the keeping open of the hotel in the way that had been usual and as the plaintiffs actually kept it; that the terms of the lease had not been violated; and the plaintiffs were entitled to a return of the money deposited.

Quære, whether the "Annex" was an "inn" in the strict sense attached to the word by decisions cited.

Thompson v. Lacy (1820), 3 B. & Ald. 283, referred to.

Per FISHER, J.A.:—The defendant was not estopped by his conduct from complaining, and was entitled upon his counterclaim to recover damages such as might reasonably be supposed to flow from a breach of the contract, and to an accounting.

AN appeal by the defendant from the judgment of McEvoy, J., at the trial, in favour of the plaintiffs for the recovery of \$2,795 in respect of a claim for the return of a deposit made in connection with the leasing of Brant Inn, at Burlington, Ontario.

March 13. The appeal was heard by RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

Norman Sommerville, K.C., for the appellant, argued that, the plaintiffs having failed to keep the Brant Inn open as a public-house, the defendant suffered damage in consequence thereof. Under the terms of the lease, the plaintiffs should have kept the main building open continuously, summer and winter.

W. R. Wadsworth, K.C., for the plaintiffs, respondents, contended that it was never the intention of the parties to the lease that they, the respondents, should keep open the Brant Inn (the main building) in the winter season. The "Annex" was kept open in the winter. Even if they did not keep open the main building during the whole season, the appellant made no complaint, and was now estopped.

Sommerville, K.C., in reply, contended that there was no estoppel against the appellant. He was away in Florida from the 6th January till March, and in any event felt that he was protected against breaches of the lease by the \$2,500 in his possession.

May 9. RIDDELL, J.A.:—The defendant was the owner of the old Brant House on the Hamilton-Toronto highway, and conducted it for some years; he was at the same time the proprietor of a country club near by; the club-house burning down in 1925, he built what is called the Brant Inn Annex—or, briefly, "the Annex"—this being a frame building used chiefly for the

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—
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App. Div. "lunch-trade." The old Brant House burning down, he built a
1930. brick and veneer structure with some 25 to 30 rooms, etc.—a hotel-
Q.R.S. building, in short. This had a formal opening, though not com-
CANADIAN plete, on the 1st July, 1926, and was in the possession of one
CORPORATION LTD. Richardson, who remained until the autumn of 1926, when he
v. "unfortunately left" (as the defendant puts it); then one Searer
COLEMAN. took possession in November, and remained in until April or
Riddell, J.A. May, 1927. The former Brant House had been kept open only in
the summer and as a summer-hotel, while the Annex was kept
open during the winter.

The plaintiff company, through its officers, entered into negotiations with the defendant at the Annex, the main building being then "closed tight," to be opened in the summer like any other summer-hotel. It was "a sort of road-house in the summer-time, catering to tourist traffic . . . and in the evening to dances." In the negotiations, the intention of the company's representatives was undoubtedly to keep the main building open only in the summer, and in the winter to keep the Annex open for such custom as offered itself, "exactly as he (Coleman) had done before;" and there was not a word said as to the times the main building or any part of the premises should be kept open; Coleman never mentioned any time, and the particular manner of running the establishment passed *sub silentio*.

A lease was drawn up and executed of the whole premises, "the property known as Brant Inn, Annex, cottage and garage;" this contained, *inter alia*, a clause as follows:—

"It is further understood and agreed that the lessees . . . will continually conduct and carry on the business of a high-class inn, to reasonably meet the requirements of its patronage, and will use every reasonable means to secure all business possible for the success of the business . . ."

There are other provisions in the lease which were considered at the trial; but all questions arising from the other clauses are set at rest by the judgment, there being no appeal except as to the effect of the clause set out above.

As a guarantee for the performance of all conditions, the lessees deposited \$2,500 with the defendant under the following clause:—

"As a guarantee for the full and proper performance of all conditions of this lease, the lessees agree to and do deposit with the lessor the sum of \$2,500; the said deposit to remain in full until the completion of this lease; after all the conditions of the lease have been complied with and all adjustments properly made and all trade-accounts paid, the lessor agrees to return the deposit

of \$2,500 to the lessees with interest at the rate of 6 per cent. per annum."

The company, alleging that everything had been done to entitle it to the return of the money, demanded it, and, on this being refused, brought action. The defendant set up several alleged violations of the terms of the lease, the only one of importance here being:—

"(c) On or about the 4th December, the said plaintiffs absolutely closed the Brant Inn, main building, ceasing to do business, and the said building remained closed until the 15th March, with the exception of several parties where the said dance-hall was rented for a nominal sum to outside parties."

This is the real question before us—the plaintiff company not denying the closing of the main building, but claiming that this was in no way a violation of the terms of the clause in the lease, copied above, their statement being, "It had been the custom to keep the whole business open in the summer-time and the Annex open in the winter-time"—"that was our intention when we took the lease"—"the main building . . . we closed . . . as a hotel" and "operated the Annex as he (the defendant) had done previously"—"just exactly as he had done previously"—"in the winter-time we did exactly what he had done before, and that is to conduct the Annex, which is the place that was open when we made the lease." The facts are not denied by the defendant, but he claims that, under the terms of the lease, it was the duty of the plaintiffs to keep the main building open continuously, and not to close it even during the winter, when it could be conducted only at a great loss, which he, himself, when running the place, did not do.

Of course, the Court does not make a new contract for the parties; and either party is entitled to have the Court enforce the contract he actually made, no matter if it will cause the other party serious loss—the Court has in such a case nothing to do with hardship, actual or affected, but must take the contract as the parties made it.

And, equally of course, the English Courts have held that "An inn . . . may be defined to be a house in which travellers, passengers, wayfaring men, and other such like casual guests are accommodated with victuals and lodgings and whatever they reasonably desire for themselves and their horses at a reasonable price while on their way:" *vide Rex v. Luellin* (1761), 12 Mod. 455; *Thompson v. Lacy* (1820), 3 B. & Ald. 283; Burn's Justice, vol. 1, *Alehouse*. A refreshment-bar, structurally severed, though part of a duly licensed premises, is not an inn: *Regina v. Rymer* (1877), 46 L.J.M.C. 108, 2 Q.B.D. 136; *Strauss v. County Hotel*

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App. Div. *and Wine Co.* (1883), 53 L.J.Q.B. 25, 12 Q.B.D. 27; nor is an
 1930. ordinary coffee-house: *Doe d. Pitt v. Laming* (1814), 4 Camp.
 Q.R.S. 77; nor a restaurant: *Ultzen v. Nicols*, [1894] 1 Q.B. 92, 63
 CANADIAN L.J.Q.B. 289, 70 L.T.R. 140, 42 W.R. 58; nor is a boarding-
 CORPORATION house: *Dansey v. Richardson* (1854), 23 L.J.Q.B. 217, 3 E. & B.
 LTD. 144; Stroud's Judicial Dictionary, 2nd ed. (1903), vol. 2, p. 978,
 v. *sub voc.* "Inn." But the meaning of words varies according to
 COLEMAN. circumstances — e.g., few if any inns in Toronto (excepting
 Riddell, J.A. "farmers' taverns" and the like) will now furnish accommodation
 for horses; and, while it must be admitted that the Annex was not
 an inn in the strict sense attached to the word in the decisions, it
 may, and I think should, be held that there was no breach of the
 agreement by the plaintiffs.

That the plaintiffs thought the language employed in the clause
 in question meant a keeping open as Coleman had been in the
 habit of keeping it open is manifest; the defendant does not give
 any evidence suggesting that he had any different idea of the
 meaning of the clause; and subsequent conduct on his part lends
 strong support to the view that he attached the same meaning
 to the clause as the plaintiffs did.

After the closing down of the main building to the knowledge
 of the defendant—he lived but a third of a mile away—the de-
 fendant made no complaint of this; "he never at any time com-
 plained to us, or asked us to keep the main inn open through
 the winter-season, until long after . . .," says the witness, and
 this is not contradicted. Moreover, the defendant writes on the
 4th January: "I regret I feel it necessary . . . to write you re-
 garding the care of the Brant Inn. After all the caution I tried
 to impress on your representative Cliff regarding the turning off
 and draining out of the plant in frosty weather, the pipes froze
 badly previous to the New Year's party and cost considerable to
 repair. After this experience it was again impressed on Ernie
 ('a sort of supervisor') to keep fire in the building until the
 pipes were drained . . ." Of this letter the learned trial Judge
 most justifiably says that it "recognises that it was expected that
 they (the pipes) would be shut off and the water drained."

We fail utterly to find any complaint by the defendant of the
 closing of the main building; but everything indicates that what
 he expected and was providing for in the lease was that the whole
 undertaking would be carried on in the accustomed way, and not
 that the main building would be used differently from the way
 he had used it himself. To my mind, it would be extraordinary
 if the proprietor of a "summer-hotel" should think of its being
 kept open during the winter; and I can come to no other conclu-

sion upon the evidence here than that the agreement meant the keeping open of the hotel as had been usual and as the plaintiffs actually did keep it.

In this view, we need not consider how far the case of *Thompson v. Lacy*, 3 B. & Ald. 283, modifies the conception of the legal meaning of "inn"—it would seem from that case that a coffee-house, where beds as well as provisions are provided, is an inn; and in the present case the defendant himself speaks of the Annex as having beds.

Moreover, there is no evidence that he lost anything by the closing of the main building.

On all grounds, I think this appeal must be dismissed with costs.

MASTEN, J.A.:—In this case I agree in the conclusion reached by my brother Riddell, dismissing the appeal. I found my opinion on the view that the evidence fails to disclose that the business was not carried on so as "to reasonably meet the requirements of its patronage," after the 3rd December, which is the period complained of. In my opinion, the defendant was bound to prove by admissible evidence a clear breach by the plaintiff of this term of the lease, and this I think he has failed to do.

ORDE, J.A., agreed with RIDDELL, J.A.

FISHER, J.A.:—The defendant, being the owner of certain hotel properties situate at Burlington, Ontario, on the Toronto-Hamilton Highway, on the 14th May, 1927, entered into an agreement in writing with the plaintiffs to lease these properties to them for a period of one year from the 14th May, 1927. These properties are described in the agreement as the "Brant Inn," the "Annex," and the cottage and garage. The plaintiffs operated the Brant Inn until the 3rd December, 1927, only; and, after the expiration of the year, demanded a return of \$2,500, being the amount deposited with the defendant as a guarantee for the due fulfilment of the conditions of the lease; and, upon the defendant's refusal, this action followed, and judgment was given in favour of the plaintiffs and the defendant's counterclaim was dismissed. The defendant now appeals.

By the agreement or lease the rents were to be paid on gross percentage of the receipts only. The clause reads:—

"Beginning from November 14th, 1927, and *continuing* until May 14th, 1928, the rental shall be 10 per cent. of the gross receipts, providing the gross receipts for the *preceding 6 months* shall total approximately \$7,400; should such receipts have been

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less than approximately \$7,500 for such 6 months, the rental for the period from November 14th, 1927, to May 14th, 1928, shall be 12½ per cent. of the gross receipts.”

The other clauses in the agreement that are of importance on this appeal are:—

“It is understood and agreed that the inn, annex, and cottage shall be furnished and equipped with suitable furnishings and utensils, practically new and in good condition, anything further that is reasonably necessary to meet the requirements of the business shall be approved by the lessor on request.”

“The lessor agrees to install at once a buzzer signal and telephone system in each of the bedrooms and private dining-rooms in the inn and annex.”

“It is further understood and agreed that the lessees . . . will continually conduct and carry on the business of a high-class inn to reasonably meet the requirements of its patronage and will use every reasonable means to secure all business possible for the success of the business.”

Then comes the guarantee clause, which reads:—

“As a guarantee for the full and proper performance of all conditions of this lease, the lessees agree to and do deposit with the lessor the sum of \$2,500—the said deposit to remain in full until the completion of this lease; after all the conditions of the lease have been complied with and all adjustments made and all trade-accounts paid, the lessor agrees to return the deposit of \$2,500 to the lessees with interest at the rate of 6 per cent.”

The main contention of the appellant is, that, the plaintiffs having failed to keep the “Brant Inn” open as a public-house, he suffered damage in consequence, and, in addition, he counter-claims for \$2,000, being the extent of his damage for the closing of the hotel proper, \$1,600 for shortages in the inventory, \$588.20 for repairs to the heating and plumbing and water-rates and for various other items, and also \$1,000 as a further sum for his percentages on various items not entered in the books, as required by the terms of the agreement.

There is no serious complaint by the defendant that the hotel properties were not properly operated and conducted up to the 3rd December, 1927.

For the plaintiffs (respondents) it is contended that it was never understood, nor was it the intention, that they should keep open the Brant Inn excepting for the duration of the summer-season, and during that period they operated the hotel properties according to the terms and meaning of the lease, and that, even if

they did not keep the Brant Inn open during the whole season, the defendant raised no objection and is now estopped.

It will be noted that there is nothing in the lease separating the operation of the "Brant Inn" from the operation of the "Annex."

The questions for determination are: (a) the construction of the agreement or lease; (b) was there a breach? and, if so, (c) what is the true measure of damages for the breach?

If the true meaning of the agreement or lease is that the Brant Inn was to be kept open only during the season, the respondents must succeed, and if on the other hand all the provisions of the agreement are binding and there has been no estoppel, the appellant must succeed.

The learned trial Judge was of the opinion that the defendant never expected the "Brant Inn," being the main building of the hotel, to be operated and kept open during the winter as well as the summer months, and it was always the intention that, if the plaintiffs operated the hotel reasonably, as was done in the year previous by the defendant, and in the subsequent year, the plaintiffs must be held to have satisfied the terms of the agreement as executed, and to be entitled to recover the deposit.

With respect, I am unable to agree with the learned trial Judge.

A brief summary of the facts will assist in a better understanding of the questions we are called upon to decide. In 1926, a building known as the "Old Brant Inn" had been destroyed by fire, and in its place the defendant erected a large brick veneer hotel or inn, containing 25 to 30 bedrooms, all of which were furnished, 12 baths, a large dining-room, and a dance-hall, and in the building was installed a heating plant. The "Annex" to this building was used for lunches and soft drinks only. The hotel is distant about 6 miles from Hamilton, with a population of upwards of 125,000, and 30 miles from Toronto, with a population of about 800,000, and in addition there are many large towns situate on the highway between Toronto and the hotel from which to draw day and night trade. Upon the highway passing the properties there are many local and through busses, continuously carrying passengers, including busses coming from the Niagara border of the United States. The property has an attractive and valuable situation, and cannot or should not be classed with what are known as "summer-hotels," such as are to be found in such places as Muskoka and the Georgian Bay; but on the contrary, has a combined summer and winter location.

In October, 1927, the profits were falling as trade was slackening, and the plaintiffs, becoming apprehensive about losses which

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might occur if the hotel was operated during the winter months, entered into negotiations with the defendant to see if some arrangement could not be made to overcome the anticipated loss. The defendant states that he agreed that, if the plaintiffs operated "The Brant Inn" two nights a week, Fridays and Saturdays, and holidays, until the end of the term, he would be satisfied.

That the plaintiffs did intend to operate the "Brant Inn" on the terms arranged is manifest from the production of two exhibits (9 and 10). These exhibits are copies of advertisements informing the public that the "Brant Inn" would be open for dancing every Friday and Saturday "all winter," and that dinner would be served on Sundays.

This lease was prepared by a solicitor and entered into by keen business men and admits of no ambiguity whatever; and, unless it can be discovered in the evidence that the defendant released the plaintiffs from what the lease stands for, no Court would be justified in ignoring its terms.

It will be observed that the lease provides "for the term of one year beginning the 14th day of May, 1927;" that the gross profits differ for two distinct 6-months periods; that there is a covenant that the plaintiffs "will *continually* conduct and carry on the business of a high-class inn, to reasonably meet the requirements of its patronage, and will use every reasonable means to secure all business possible for the success of the business;" that the defendant had agreed to install "a buzzer signal and a telephone system in each of the bedrooms;" that the last clause of the agreement provides that should the lessor be the owner of the property *at the expiration of the lease*, the plaintiffs were to have the first refusal for a rental.

It is difficult to understand, if the "Brant Inn" was to be closed at the end of the season or 6 months, why that was not inserted in the agreement instead of a one-year term, and, if the operation was for only the season or 6 months, why the lease provides for a different percentage of gross profits for one-half of the year as contrasted with the other, and why the agreement provides for a "continuous conduct of the business," and again, according to the last clause of the lease, the plaintiffs were to be entitled to negotiate for a renewal "at the expiration of the lease." Then again, in the plaintiffs' letter to the defendant of the 3rd October, 1927 (exhibit 11), which was written in connection with some statement of expenditures, they use these words: "So that we can adjust your account to date, and *formulate our policy for the balance of the lease.*" And if for only a season or 6 months, what possible explanation is there for the plaintiffs retaining the

keys and possession until the end of the term? The only answer that I can see, in view of the foregoing, and the construction of the plain wording of the lease, is, that the whole property was to be operated throughout the year. The defendant had gone to great expense in erecting the Brant Inn, furnishing many bedrooms and baths, and installing a heating plant (which one would naturally infer was for the winter months), and I think it was because of all these facts that the lease was made for the whole year, and that the intention was that the Brant Inn was to be kept open during the winter-season. It may be quite true that during the late autumn and winter months there might be only a few guests; but, owing to the peculiar situation of the hotel and its equipment, the defendant had every reason to believe that under proper management a reasonable winter's trade could be cultivated.

The undisputed facts are that the plaintiffs did not operate the Brant Inn after the 3rd December, 1928, except on three occasions, namely, New Year's Eve, at which 540 people were present, a Valentine party at which 318 people were present, and the St. Patrick's dance at which 274 were present, and other than on these occasions there was no heating, no advertising or publicity, and by reason thereof a violation by the lessees of the term that they "will continue to conduct and carry on the business of a high-class inn to reasonably meet the requirements of its patronage, and will use every reasonable means to secure all business possible for the success of the business."

The trial Judge seemed to think that the plaintiffs had satisfied the terms of the lease because they operated the property as it was operated the previous year and a subsequent year. What was done the previous year has nothing to do with what the plaintiffs had agreed to under the existing lease, and it must not be forgotten that in the previous year the main building had not been fully completed, and as to the subsequent year the best evidence that the main building could be operated successfully during the winter season is that between the 15th December, 1928, and the 15th March, 1929, the receipts amounted to over \$16,000.

The lease must be read as a whole, and, if the covenant "will continuously carry on a high-class inn," etc., is read in connection with that part of the lease which provides for a different scale of gross profits for a 6-months period, as contrasted with the other 6 months, how would it be possible for the plaintiffs to take care of the patronage, etc., with the hotel closed?

To me it is a monstrous proposition to advance, that lessees, after having deliberately entered into a binding contract for one year, and after the best paying part of the year had gone in which

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they made considerable profits, and believing that they would lose money if they continued to the end of the term, or because they were disappointed in not securing a renewal of the lease, could, at will, thrust aside their obligations under the lease and the subsequent arrangements made or attempted to be made in ease of their obligations, and not be answerable for their conduct. It might just as well be argued that the defendant was entitled to say to the plaintiffs after the 6-months period had expired, "The intention was only to operate for 6 months, and I now demand possession and you must get out." Would not the plaintiffs, in such circumstances, be justified in saying, "We have a contract with you for one year and we will not give it up?"

If the plaintiffs were bound—as I hold they were—for one year's operation of the whole property, they failed, and if they were bound under the subsequent arrangement for two nights and holidays, they failed in that also, and I can see no escape from the conclusion that the appellant must succeed.

It was argued by the plaintiffs that, because the defendant agreed in October, 1927, to the "Brant Inn" being closed during the remainder of the term excepting for two nights a week and holidays, the defendant is not entitled to an enforcement of the covenant for the whole year's operation. That contention is, I think, met by the fact—about which there is no contradiction in the evidence—that the defendant agreed to the change in the terms of the lease only in consideration of the plaintiffs living up to the two nights and holidays, which they failed to do. It was also argued that the defendant did not protest against the closing down and that his only objection was that the plaintiffs were to be careful to draw off the water and protect the heating plant (see letter of the 4th January, 1928, from the defendant to the plaintiffs), but it must not be forgotten that this letter was written shortly after the defendant had agreed to the plaintiffs operating for two days and holidays, and it was as to the intervals between these two days and the holidays that the defendant was concerned as to what might happen if the plant was not properly drained. The letter opens in these words: "I regret I feel it necessary in your interests, as well as my own, to write you regarding the care of the Brant Inn;" and, later on, the defendant notifies the plaintiffs that he is about to leave for Florida. At this time the plaintiffs had not notified the defendant that they intended to ignore their verbal agreement with him and to close down permanently. The evidence is that the defendant was absent in Florida from the 6th January until the March following, and knew nothing what-

ever as to how the Brant Inn was being operated during that period.

The defendant knew that he was entitled to use the \$2,500 deposited with him as a guarantee against any damage he might suffer from the non-fulfilment of the terms of the lease, and I do not see that the defendant was called upon, even if he happened to be on or about the property off and on, to make complaints about the plaintiffs' conduct in the operation of the hotel. That was the plaintiffs' own business, and they were supposed to know their business and what the terms of the lease and the subsequent arrangements called for; and for all the defendant knew it might be that the plaintiffs were, by closing down, willing to sacrifice the \$2,500, rather than submit themselves to what might be a greater loss if they were to operate the Brant Inn until the end of the year. I cannot see, under these circumstances, wherein the defendant, by his conduct, is estopped from now complaining.

The only remaining question is as to the damages, which I take it are those that may reasonably be supposed to flow from a breach of the contract.

In *Findlay v. Howard* (1919), 58 Can. S.C.R. 516, it was held that in an action for damages for loss of future profits arising out of a wrongful breach of partnership contract, events which happened between the date of the commission of the wrong and the time of the trial must be taken into account in estimating the loss for which the plaintiff is entitled to compensation and in determining what actually was the value of the contract to him at the date of the breach. Mignault, J., at p. 544, said: "Where future damages are claimed, future conditions must necessarily be considered, and what better evidence of conditions, which were in the future at the date of the breach, can be made than by shewing, at the date of the trial, what has actually occurred since the breach of contract?"

Haack v. Martin, [1927] S.C.R. 413, was a case where a defendant had been evicted by the landlord and sued for damages, including loss of probable profits. Evidence of profits by new tenants in the succeeding year was accepted by the Court as the basis of a judgment in favour of the plaintiff. Rinfret, J., at p. 418, in affirming the judgment, stated that in estimating the loss or damage the best evidence is to be found in the events which happened between the date of the breach of the contract and the date of the trial.

For breach of contract resulting in loss of publicity and for possible loss of business, see *Marcus v. Myers and Davis* (1895), 11 Times L.R. 327; *Marbe v. George Edwardes (Daly's Theatre)*

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Ltd., [1928] 1 K.B. 271, 273; and *Turpin v. Victoria Palace Ltd.*, [1918] 2 K.B. 539, 545, where McCardie, J., says: "I can see no reason at all in law to prevent a plaintiff, if the contract and circumstances be appropriate, from securing damages for the loss of advantageous publicity caused by the defendant's breach of contract."

See also *Antoniou v. Arnett* (1922), 65 D.L.R. 661; Mayne on Damages, 9th ed., pp. 11 and 12, where it is stated that damages as to the future should be based upon the assumption not of unusual but of normal conditions, as they have existed up to the time of the breach.

In my opinion there is sufficient evidence establishing that the defendant is entitled to damages arising from and after the 3rd December, 1928, and up to the 15th March, 1929, and for the ascertainment thereof the defendant is entitled to a reference to the proper officer to investigate and report, and in addition the defendant is entitled to have an accounting of the percentages accruing from every source pertaining to the business of the Brant Inn, the Annex, cottage and garage, and including the percentages of the New Year, St. Valentine, and St. Patrick parties.

The appeal should be allowed with costs, and a reference directed to the proper officer to ascertain the amount due, and for a report.

Appeal dismissed (FISHER, J.A., dissenting).

[APPELLATE DIVISION.]

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RALPH V. KIRKPATRICK.

May 9.

Costs—Third Party Proceedings—Discretion of Court—Appeal—Judicature Act, sec. 77(1).

Under sec. 77(1) of the Judicature Act, the Court has full power and discretion to deal with the costs of third party proceedings.

At the trial of an action for damages for injury to the plaintiff's motor-vehicle by the negligence of the defendant, judgment was given against the defendant for \$300 and for the defendant against a third party for recovery over of that sum, the third party in its pleading admitting that, if the defendant was liable to the plaintiff, it (the third party) was liable over to the defendant. An appeal by the defendant from the judgment against him was allowed and the action dismissed. The third party did not appear at the hearing of the appeal, and no claim was made by it for costs against the defendant:—

Held, that the third party proceedings were not warranted, and the defendant ought not to recover from the plaintiff any costs thereby occasioned.

Wood v. Brown (1907), 10 O.W.R. 178, and *Smith v. City of Welland* (1921), 50 O.L.R. 252, approved.

The judgment against the third party for indemnity over was vacated.

AN appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff for the recovery of \$300 damages from the defendant for injury to the plaintiff's motor-vehicle resulting from a collision upon a highway with the defendant's motor-vehicle, and in favour of the defendant against the Empire Garage, brought in as a third party, for the same amount.

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March 26. The appeal was heard by RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

T. N. Phelan, K.C., for the appellant.

J. W. Bicknell, for the plaintiff, respondent.

The third party did not appear and was not represented upon the appeal.

THE COURT at the hearing allowed the defendant's appeal and dismissed the action with costs to be paid by the plaintiff; reserving judgment as to the costs in connection with the third party proceedings.

May 9. The judgment of the Court upon this question of costs was read by MASTEN, J.A.:—This was an appeal by the defendant from the judgment of the County Court of York, dated the 2nd January, 1930. The action was brought by the plaintiff to recover damages for injury to his automobile resulting from a collision with an automobile owned by the defendant. The automobile of the defendant was garaged at the garage of the third party, and was, without the defendant's concurrence or assent, taken out of the garage by an employee of the third party, and it was while the car was being driven by this employee of the third party that the accident occurred which gave rise to this action.

The County Court Judge found the defendant liable and awarded \$300 damages against him and directed that he should recover over against the third party the amount so found due by him to the plaintiff.

The defendant having appealed to this Court, his appeal was allowed and the action against him was dismissed with costs to be paid by the plaintiff. The disposition of the costs in connection with the third party proceedings was reserved.

The third party not having appeared on the appeal before us, there is no claim on the part of the third party against the plaintiff for costs, and that need not be considered. The only question that really remains open is, whether the defendant should recover against the plaintiff his costs of the bringing in of the third party

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Masten, J.A. We are referred to the case of *Russell v. Eddy* (1903), 5 O.L.R. 379. That case was founded on the provisions of Rule 214 as it then existed; but which appears in the various amendments and consolidations of the rules to have dropped out of existence. However, under sec. 77 of the Judicature Act, I think that the Court has full power to deal with the costs in question. The first subsection of sec. 77 reads as follows:—

“Subject to the express provisions of any statute, the costs of and incidental to *all proceedings* . . . shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid.”

These words, in my opinion, afford ample authority for dealing with the costs in relation to these third party proceedings as the Court may see fit in the exercise of a judicial discretion.

Under the English practice a failing plaintiff will not ordinarily be ordered to pay the costs of the third party: *Witham v. Vane* (1883), 32 W.R. 617; *Williams v. South-Eastern Railway Co.* (1878), 26 W.R. 352. Where the plaintiff's claim against the defendant failed, so that it became unnecessary to decide the question of the liability to indemnify, the third parties were refused their costs: *In re Salmon* (1889), 42 Ch. D. 351, 359.

In the present case it is of importance to observe that the third party, in delivering its pleading, admits that, if the defendant is liable for damages claimed by the plaintiff in the statement of claim, it is liable to the defendant therefor.

In *Smith v. City of Welland* (1921), 50 O.L.R. 252, the plaintiff's action was dismissed, and Orde, J., as trial Judge, says (p. 260):—

“There being no liability on the part of the defendants for which they can claim indemnity against the third party, the defendants' claim against the third party will be formally dismissed, and as, in the result, the defendants, having a complete defence against the plaintiffs, need not have joined the third party, I think he is entitled to his costs against the defendants.”

In the present case, no claim has been or could now be put forward by the third party against the defendant for costs, and, following the principle of the case last cited, and also approving the discretion exercised by Britton, J., in the case of *Wood v. Brown* (1907), 10 O.W.R. 178, I think that, in the circumstances, the third party proceedings were not warranted, and that the

defendant ought not to receive from the plaintiff any costs thereby occasioned.

All steps appear to have been taken in forgetfulness or ignorance of the recent amendment of the Highway Traffic Act in 1929, by 19 Geo. V. ch. 68, sec. 9.*

The certificate embodying the order of this Court should make it plain that the judgment against the third party for indemnity over is vacated.

Order accordingly.

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Negligence—Railway—Motor-vehicle Struck by Train at Level Highway Crossing—Injury to Driver and Passenger—Evidence—Findings of Jury—Power of Trial Judge to Order New Trial—Rule 505—Appeal to Divisional Court—Reversal of Judgment—Rate of Speed at Crossing—Railway Act, R.S.C. 1927, ch. 170, secs. 309 (c), 421 (e)—Real Cause of Collision—Recklessness of Motorist and Passenger—Duty of Passenger in Position of Impending Danger—Breach of Statutory Duty not Real Cause of Disaster.

In two actions brought respectively by G., the owner and driver of a motor-car, and by B., a passenger in the car, to recover damages for injuries sustained by both of them by reason of the alleged negligence of the defendants, whereby the motor-car, at a level highway crossing, was struck by a train of the defendants, the jury, at the trial of the two actions together, found that the collision was caused by the negligence of the defendants, consisting in: "Train going more than 10 miles per hour—no definitely conclusive evidence that bell was ringing." The jury also found that there was negligence on the part of the plaintiff G., contributing to the collision—"Should not have approached and crossed tracks in high gear." They assessed the damages of G. at \$2,261, and apportioned the fault as 14 per cent. on the part of G. and 86 per cent. of the defendants. They found that there was no negligence on the part of B. contributing to the collision, and assessed her damages at \$1,351.

Owing to the fact that there had been an accident at that crossing a short time before, the defendants were required by sec. 309 (c) of the Railway Act, R.S.C. 1927, ch. 170, not to run a train over the crossing at a speed greater than 10 miles an hour, and by sec. 421 (c) were liable to a penalty for any infraction of that provision:—

Held, by the majority of the Court, that the fact that the train was travelling faster than 10 miles an hour was not the cause of the collision, and there was no evidence upon which the jury could properly and reasonably find as it did.

*But see sec. 10 of the amending Act of 1930, 20 Geo. V. ch. 48, adding sec. 41a.

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The finding in regard to the bell was not a finding of negligence—it was for the plaintiffs to prove that the bell was not ringing and not for the defendants to prove that it was.

The actual and proximate cause of the collision was the negligence of G. in attempting to cross the tracks when the train was so near.

Per LATCHFORD, C.J.:—A duty rested upon B. which she did not discharge: in the presence of impending danger, of which she must have been conscious, she neglected, by suggestion or protest, to prevent G. from taking an obvious risk of exposing her to injury or death.

It is no less the duty of the passenger, where he has the opportunity, than of the driver, to learn of danger and avoid it, if practicable.

Brickell v. New York Central and Hudson River Railroad Co. (1890), 120 N.Y. 290, approved.

Per ORDE and FISHER, J.J.A.:—The trial Judge had no power, under Rule 505 or otherwise, to order a new trial upon the ground that the jury had not answered to the satisfaction of the Court certain questions submitted to them.

Service v. Sundell, [1929] W.N. 182, 241, 45 Times L.R. 569, distinguished.

The judgment of RANEY, J., in *Gauley's* case, 64 O.L.R. 527, and that in *Birkett's* case, not reported, reversed (MASTEN, J.A., dissenting).

Per MASTEN, J.A.:—There was a breach of a statutory duty on the part of the defendants, and that breach contributed to the accident.

APPEALS by the defendants in the two actions from the judgments of RANEY, J., who tried the actions together with a jury. The judgment of RANEY, J., in the *Gauley* case is reported, 64 O.L.R. 527. His judgment in the *Birkett* case, which arose out of the same accident, is not reported. There was also a cross-appeal by the plaintiff Gauley from the judgment of RANEY, J.

January 30 and 31. The appeals were heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, J.J.A.

Angus MacMurchy, K.C., and *J. Q. Maunsell*, for the defendants, argued that in the *Gauley* case the defendants were not guilty of any negligence causing the accident even if, which was denied, their train was going at a slightly greater speed than 10 miles per hour approaching the crossing, though such speed at this place was a breach of a statutory duty. There was no causal connection between the speed and the injury. The real, effective, cause of the accident was the plaintiff's own negligence in driving his motor-car in front of the train, instead of looking and listening for an approaching train a reasonable time before reaching the railway tracks, and in passing over the crossing in high gear, without having sufficient control over his motor-car. Where a jury finds several grounds of negligence, one of which cannot stand, the apportionment of damages, being based on these several grounds of negligence, cannot stand, and judgment cannot be entered for the amount found by the jury: *Service v. Sundell*,

[1929] W.N. 182, 45 Times L.R. 569; *Cooper v. Swadling* (1929), 46 Times L.R. 73; *Grand Trunk Railway Co. v. Labrèche* (1922), 64 Can. S.C.R. 15; *British Columbia Electric Railway Co. Ltd. v. Loach*, [1916] 1 A.C. 719, especially at p. 721; *Godeau v. Levy* (1925), 236 Pac. Repr. 354. In the *Birkett* case, similar principles governed. The plaintiff Birkett's own negligence in not listening, watching, and striving by protest to Gauley to prevent the accident by careful driving was the proximate and real cause of the accident to her; *Parramore v. Denver and Rio Grande Western R. Co.* (1925), 5 Fed. Repr., 2nd ser., 912; *Brommer v. Pennsylvania R. Co.* (1910), 179 Fed. Repr. 577. The second part of the jury's answer to question 2 was not a finding that the defendants were guilty of negligence causing the accident by failure to ring the bell.

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T. N. Phelan, K.C., and *D. Douglas*, for the plaintiffs, contended that the Judge had power to order a new trial in the *Gauley* case. The defendants' breach of their statutory duty, in going at a speed of more than 10 miles per hour, was the real, effective, cause of the accident. If the train had been going at only 10 miles an hour, it would have been within Gauley's range of vision and he would have stopped in time to have avoided the accident. The jury were entitled to draw the inference that if the train had been going at only 10 miles per hour there would have been no accident. On the evidence, the jury could reasonably find that the train's exceeding the statutory limit was the cause of the accident: *Wabash Railway Co. v. Follick* (1920), 60 Can. S.C.R. 375; *Richard Evans & Co. Ltd. v. Astley*, [1911] A.C. 674; *Grand Trunk Railway Co. of Canada v. Hainer* (1905), 36 Can. S.C.R. 180. As to the *Birkett* case, it was the province of the jury, if they saw fit, to absolve the plaintiff Birkett from the charge of contributory negligence. The jury have done this, and this Court should not interfere: *Canadian Pacific Railway Co. v. Smith* (1921), 62 Can. S.C.R. 134.

May 9. LATCHFORD, C.J.:—The evidence in these cases is discussed at length in the opinion of my brother Fisher (*infra*) which I have had the advantage of reading. However, it may be desirable to add a few words.

The provincial highway along which the plaintiffs were travelling lies almost parallel to the defendants' railway for a considerable distance east and west of the intersection where the accident happened. It approaches from both directions at an angle of about 5 degrees; 80 or 90 feet from the crossing, the highway curves to

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the left or north until it reaches the rails, which are passed over on a right angled course. More than 100 feet before the railway was reached there stood on the right side of the highway, in plain view, a large distinct sign indicating that a railway crossing was ahead of the plaintiffs, and bearing in large Roman letters the word "DANGER." From a much greater distance westerly there was a view of the railway, obstructed to some slight extent by a tree and low fence east of the kerb; but nearer the crossing than the warning sign, at a point about 50 feet from the intersection, there was an absolutely unobstructed view from the motor-car for more than 2,000 feet east of the crossing.

Within much less than that distance, probably within 500 feet of the crossing, a gravel-train, consisting of a locomotive and more than 20 loaded cars, was clanging along at slowing speed. The whistle had been duly sounded for the crossing, and the bell, upon the evidence, was ringing.

The plaintiffs were sitting in the front seat, Miss Birkett riding, in companionship with her host, Gauley, upon a mutual adventure. It is not suggested that either plaintiff was deaf or suffering from defective vision. The train was directly in front of their eyes before Gauley turned his car to the left to pass over the crossing. At that time and even later, when he was less than 30 feet from the railway, he could have stopped his car within a few feet in a position of absolute safety. He did not choose to do so, nor did Miss Birkett ask him to stop. When he deposed that he did not notice the danger sign he may have been telling the truth: he was familiar with the location and may have been unob-servant when passing the sign; but the large locomotive and the noisy cars roaring along towards him, he and Miss Birkett must have seen and heard. His evidence to the contrary, I cannot but regard as deliberate perjury. What he evidently thought was that he could cross the railway before the locomotive reached him, and, if so, give his companion a delightful thrill in escaping disaster.

Possibly, if the train had been proceeding at as slow a rate of speed as 10 miles an hour, the accident would not have happened; but it does not seem to me sufficient for the plaintiffs to establish that the train was going at more than 10 miles an hour, if indeed that was proved, in order to impute liability to the defendants. The cause—the actual, proximate, real cause of the accident—was the negligence of Gauley and his companion; not a 14 per cent. negligence on his part, as meticulously estimated by a jury, but 100 per cent. negligence, causing the accident.

As was said by the Chief Justice of Canada in *Canadian Pacific*

Railway Co. v. Smith (1921), 62 Can. S.C.R. 134, at p. 137, "The inference from his (the plaintiff's) evidence and that of the other witnesses examined is irresistible" that his negligence caused the accident. This case was, it is true, decided prior to the Contributory Negligence Act (Ont.), 1924, 14 Geo. V. ch. 36, but it applies in a case where a plaintiff's negligence is the actual cause of whatever damage he sustained.

Liability, if any, to Miss Birkett, rests on very much the same basis. Gauley was neither her servant nor her agent. Upon the facts a duty, in my opinion, rested upon her which she did not discharge, namely, in the presence of impending danger, of which she must have been conscious, she neglected by suggestion or protest to prevent her companion from taking an obvious risk of exposing her to injury or death. Miss Birkett was not asleep nor were her eyes closed, nor was her hearing defective, so far as the evidence discloses. Therefore, the approach of the train must have been as apparent to her eyes and ears as it was to Gauley's.

In the New York Court of Appeals, in *Brickell v. New York Central and Hudson River Railroad Co.* (1890), 120 N.Y. 290, at p. 293, it was said by Potter, J., that "the rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver or is separated from the driver by an enclosure and is without opportunity to discover danger and to inform the driver of it. . . . It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it if practicable." Many cases might be cited in support of this persuasive authority, with which I entirely agree.

I, therefore, think that the appeal in each case should succeed and be allowed with costs, and the actions dismissed with costs.

MASTEN, J.A. (*Gauley* case):—This is an appeal from the judgment of Raney, J., dated the 13th November, 1929, whereby he declared that the verdict rendered by the jury was a nullity and ordered the case to be restored to the list for re-trial.

The action is for damages which the plaintiff is alleged to have sustained when his motor-car was struck at a level crossing by a freight train of the defendant company.

The questions put to the jury and their answers were as follows:—

1. Was the collision between the defendants' train and the

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automobile of the plaintiff Gauley caused by the negligence of the defendants or their servants? A. Yes.

2. If so, in what did such negligence consist? Answer fully.
A. Train going more than 10 miles per hour. No definitely conclusive evidence that bell was ringing.

3. Was there negligence on the part of the plaintiff Gauley contributing to the collision? A. Yes.

4. If so, in what did such negligence consist? Answer fully.
A. Should not have approached and crossed tracks in high gear.

5. At what amount do you assess the damages of the plaintiff Gauley? A. \$2,261.

6. If there was negligence on the part of the plaintiff, how do you apportion the fault as between him and the railway company?
A. 14% Gauley—86% railway.

The defendants appeal on various grounds, but at the hearing the essential ground of appeal was that there was no causal connection between the speed of the train as found by the jury at over 10 miles per hour and the striking of the plaintiff's motor-car by the defendants' train, but that the effective cause of the accident was the plaintiff's own negligence in driving his car in front of the defendants' train when it was in plain sight.

With respect to the liability of the defendants I find myself unable to accede to the arguments of the defendants' counsel. It was admitted on the argument that the defendants were prohibited from passing over the crossing in question at a greater speed than 10 miles per hour, and it was further admitted that the defendants' train was proceeding at more than 10 miles per hour, namely, somewhere between 10 and 15 miles per hour.

There was, therefore, a breach of a statutory duty on the part of the defendants, and the sole question is whether that breach on the part of the defendants of their statutory duty contributed to the accident in question. I am of opinion that it did, and for this reason. This was admittedly a heavy freight-train. If it was to be brought down to a speed of 10 miles an hour and less at the crossing, it would have been necessary for the engine-driver to have begun slowing his train at some distance back from the crossing. The effect of that slowing would have been that the engine heading the train would have arrived at the crossing a second or two later than it did, and if that had taken place the accident would not have occurred, because it is undisputed that the plaintiff's automobile was struck on its right-hand side by the front of the engine and carried in front of the engine for some distance without being thrown to one side or the other. The motor-car

must, therefore, have been directly on the tracks in front of the train at the time that it was struck. Admittedly it was not stalled, but was proceeding at the rate of about 15 or 20 miles per hour. It had only a distance of 5 or 6 feet to go in order to be clear of the train. It would have traversed that 5 or 6 feet in the space of part of a second, and, if the defendants' train had been slowed up, as I have already indicated, the motor-car would have been well across the railway tracks before the train reached the crossing.

I am, therefore, of opinion that the breach of statutory duty on the part of the defendants in failing to slow down their train to 10 miles an hour or less was a contributing cause to the accident and that the defendants are liable.

I think that Gauley was guilty not only of contributory negligence at the earlier stages, by carelessness in his approach to the crossing, but also that at the later stage, when the near approach of the railway train was obvious, he had the last chance to avoid the accident, because, travelling at the pace claimed by him, he could, at a time when he was very near the railway tracks, have stopped his car short of the tracks. Before the recent change in our law of contributory negligence, I would have dismissed his action.

Under our present law the situation is entirely changed. His double negligence (if I may use the expression) occasions only an increase of the burden of damages imposed on him. The breach of duty by both Gauley and the railway company continues up to the moment of impact. Without the breach of duty by both, the accident could not have happened, and thus each contributes to the accident. But the division of the damage made by the jury is so grossly unwarrantable that a new trial should be directed unless the plaintiff is willing himself to bear 75 per cent. of his damages and recover from the railway company only the residue, 25 per cent.

The respondent's cross-appeal should be dismissed, and I would award to the defendants the costs of this appeal.

Birkett case:—This appeal was heard along with the *Gauley* appeal. In this case the questions and answers of the jury are as follows:—

1. Was the collision between the defendants' train and the automobile of the plaintiff Gauley caused by the negligence of the defendants or their servants? A. Yes.

2. If so, in what did such negligence consist? Answer fully.

A. Train going more than 10 miles per hour at the crossing where

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accident occurred. No definitely conclusive evidence that bell was ringing.

3. Was there negligence on the part of the plaintiff Birkett contributing to the collision? A. No.

4. If so, in what did such negligence consist? Answer fully.

5. At what amount do you assess the damages of the plaintiff Birkett? A. \$1,351.

6. If there was negligence on the part of the plaintiff, how do you apportion the fault as between her and the railway company?

For the reasons which I have stated in the *Gauley* case, I am of opinion that the breach of statutory duty on the part of the defendant company was a contributing cause to the accident from which Miss Birkett suffered, and that the finding of the jury against the defendant company is warranted.

Under the circumstances disclosed in the evidence, I am unable to say that the jury were wrong in absolving the plaintiff from contributory negligence. Cases may, no doubt, arise where a passenger in a motor-car is guilty of negligence if he does not warn the driver of an impending danger. No hard and fast rule can be laid down; each case must stand on its own circumstances, but in the interests of peace and order no judicial encouragement ought to be given to what is popularly called "driving from the back seat."

I would dismiss the appeal with costs.

ORDE, J.A.:—I am of the opinion that the appeal of the railway company in each of these cases must be allowed and each action dismissed with costs.

The jury find two grounds of negligence against the company, namely, "Train going more than 10 miles per hour," and "No definitely conclusive evidence that bell was ringing."

The second ground is, of course, no ground at all. It was for the plaintiffs to prove that the bell was not ringing and not for the company to prove that it was. The answer indicates a determination on the part of the jury to fasten liability upon the company upon some ground, however flimsy.

The other ground requires some examination. Owing to the fact that there had been an accident at that crossing a short time before, the defendants were required by sec. 309 (c) of the Railway Act, R.S.C. 1927, ch. 170, not to run a train over the crossing at a speed greater than 10 miles per hour, and by sec. 421 (e) were liable to a penalty for any infraction of that provision.

The train was probably travelling somewhat faster than 10 miles per hour, and if the liability of the railway company depended upon that fact alone it would be impossible to say that the jury's finding to that effect was not justified by the evidence.

But it is quite clear that the train was in fact travelling slowly. Were it not for the statutory prohibition, no finding of negligence based upon excessive speed could be supported. In fact there was no other legal reason why a train should not travel over that crossing at 60 miles per hour, or more. So that the question is really narrowed to this: Did the fact that the train was travelling faster than 10 miles per hour cause the accident? I find it impossible upon the evidence to see how it did. Had Gauley sworn that he had seen the train in the distance, and, believing that it would not cross the highway at a rate faster than 10 miles per hour, he had proceeded on his way, the case might be different. But nothing of that sort is suggested.

The mere breach of a statutory prohibition is not enough to fasten liability upon the guilty party merely because an accident occurs contemporaneously with the breach. It must be established that the breach itself caused the injury. The breach of a statutory duty may constitute evidence of negligence, but like every other kind of negligence there must be also some causal connection between it and the injury. The speed of the train had nothing to do with this accident, and there was no evidence upon which the jury could properly and reasonably find as it did.

The judgment in the *Gauley* case directs a new trial upon the ground that the jury had not "answered certain questions submitted to them to the satisfaction of the Court." I do not think the learned trial Judge had any power to order a new trial upon this ground. Rule 505 empowers the trial Judge to order that the action shall be re-tried as in the case of a disagreement, "when a jury is directed to answer questions and answers some but not all, or when the answers are conflicting so that judgment cannot be entered upon such findings." The answers in the present case do not come within either of these categories. Upon them the learned trial Judge might either enter judgment for the plaintiff, or, if in his view there was no evidence to support them, he might have dismissed the action.

In the case of *Service v. Sundell*, [1929] W.N. 182 and 241, 45 Times L.R. 569, to which the learned trial Judge refers, the jury failed to find whose negligence caused the accident, and both the trial Judge and the Court of Appeal held that that constituted a disagreement. That is not the case here.

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In the *Birkett* case it was contended that the plaintiff, as a passenger in Gauley's car, was guilty of contributory negligence. The jury has found otherwise. The railway company being guilty of no negligence, it is unnecessary to consider whether or not a passenger in a motor-car is under any duty to be on the lookout for danger or to do more than warn the driver if she sees the possibility of danger.

Both appeals ought to be allowed and the actions dismissed with costs.

FISHER, J.A.:—Appeals by the defendants and cross-appeal by the plaintiff Gauley from the judgment of Raney, J., in actions for personal injuries, tried with a jury.

The following questions were given to the jury in the *Gauley* action and they made the following answers:—

1. Was the collision between the defendants' train and the automobile of the plaintiff Gauley caused by the negligence of the defendants or their servants? A. Yes.

2. If so, in what did such negligence consist? Answer fully. A. Train going more than 10 miles per hour. No definitely conclusive evidence that bell was ringing.

3. Was there negligence on the part of the plaintiff Gauley contributing to the collision? A. Yes.

4. If so, in what did such negligence consist? Answer fully. A. Should not have approached and crossed tracks in high gear.

5. At what amount do you assess the damages of the plaintiff Gauley? A. \$2,261.

6. If there was negligence on the part of the plaintiff, how do you apportion the fault as between him and the railway company? A. 14% Gauley—86% railway.

The same questions were submitted in the *Birkett* action, and the answers by the jury were the same excepting that they found no negligence on the part of this plaintiff and assessed damages at \$1,351.

The defendants moved for a nonsuit, and the trial Judge, after reserving judgment, directed that the *Gauley* action should be re-tried, because, in his opinion, the jury failed to answer certain questions to the satisfaction of the Court. But in the *Birkett* action the trial Judge directed judgment to be entered in favour of the plaintiff for \$1,351.

Under Rule 505 (1), where a jury is directed to answer questions, and answers some but not all, or where the answers are

conflicting so that judgment cannot be entered upon such findings, the action shall be re-tried as in the case of a disagreement.

The trial Judge's reasons for directing that the action should be re-tried are stated in the following language (64 O.L.R. at p. 529):—

"The difficulty arises under the answer to the second question, read in conjunction with the apportionment of fault under the answer to the sixth question. The inference from the second part of the answer to the second question—'No definitely conclusive evidence that bell was ringing'—would be that the jury was under the impression that the onus of establishing that the bell was ringing was on the defendant company, and this part of the answer to the second question is not therefore a finding of negligence against the railway company. But this finding may have influenced the jury in the apportionment of fault between the plaintiff and the defendant company, and therefore the verdict cannot stand: *Reynolds v. Canadian Pacific Railway Co.* (1926), 59 O.L.R. 396, and [1927] S.C.R. 505. If I were to give judgment for a formal dismissal of the action, the Appellate Division would, I think, probably set the judgment aside and order a new trial. To avoid that expense and delay I ought, I think, to treat the verdict as a nullity, and to order the case to be restored to the list for re-trial: *Service v. Sundell*, [1929] W.N. 182, and in appeal, [1929] W.N. 241."

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There being no conflicting answers by the jury, I am of opinion that it was the duty of the trial Judge either to have dismissed the *Gauley* action or to have entered judgment in accordance with the findings of the jury. *Service v. Sundell*, relied on by the trial Judge, is not an authority for the attitude adopted by him because in that case it was not the conflicting answers of the jury, but a disagreement by them on the question of negligence, that brought about the order for a new trial, because the trial Judge found that it was impossible to enter judgment on the verdict of the jury.

The defendants having raised no objection to the Judge's charge, and the whole case having been fully argued before us on all the evidence, I know of no reason why this Court should not dispose of the appeals on the merits of the case.

The following are the facts:—

The crossing at which the accident occurred is known as the "Eady crossing," and plans and photographs were made and put in shewing the highway and its approach to the railway crossing, and the different views to be obtained by any one approaching the crossing. The plaintiff Gauley was driving his Ford touring car,

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in which was seated Miss Birkett, the plaintiff in the second action, in a southerly direction at a speed of from 20 to 25 miles per hour up to within 100 feet of the crossing, and thereafter he had reduced the speed to from 10 to 15 miles per hour; between 2 and 3 p.m. on the 25th August, 1928, as Gauley was crossing the railway tracks, he was injured and the automobile destroyed by a freight train running in a northerly direction. The highway commences to curve about 125 feet south of the tracks, and there is a slight grade to the tracks commencing at about 30 feet therefrom; at the point where the curve starts and for a distance of about 90 feet on the west side of the road there is an open fence with guard-boards of about 5 or 6 inches wide nailed along and on the side and top of the posts; at a point distant about 100 to 125 feet south of the crossing, the plaintiff had a clear view of the tracks on his right for a distance of from 200 to 300 feet; the plaintiff, before approaching the crossing, looked for approaching trains, and did not see any nor did he hear either a bell or a whistle; the plaintiff had passed over this crossing frequently and knew that an accident had taken place thereon a short time prior to the 25th August, 1928; the automobile after it was struck in some way became attached to the engine and was carried a distance of about 1,200 feet, at which point the train came to a stop. The plaintiff admitted that, had he seen the train 15 feet south of the crossing, he could have stopped before reaching it, but said that, if he did not see it at 10 feet before reaching the crossing, he could not have stopped in time to avoid the accident, provided the train was proceeding at a rate of speed of from 12 to 15 miles per hour.

The only explanation the plaintiff could give for not seeing or hearing the train or the bell or whistle was that he was looking to his left to see if there was any train approaching from that direction.

Counsel for the defendants admits that sec. 309 of the Railway Act applies to this crossing and that the train at the time of the impact was crossing the highway at a little greater speed than 10 miles per hour, but contends that the speed of the train was not the *causa causans* of the accident.

Because of the opinion I have formed on the plaintiff's own admissions, it is unnecessary to refer to any of the other evidence given at the trial for either of the parties to this action. In my opinion the evidence of the plaintiff Gauley establishes beyond doubt that the determining or effective cause of the accident was his own culpable negligence in running his automobile in front of the train, and that the acts of negligence of the defendants as

found by the jury in "that the train was going more than 10 miles per hour," and "no definitely conclusive evidence that the bell was ringing"—whatever that may mean—and that the plaintiff Gauley was negligent in approaching and crossing the tracks in high gear, are not justified. It is quite obvious that the speed of the train, which consisted of 26 loaded freight-cars, must have been slow, otherwise it would not have been able to stop in a distance of 1,200 feet; but, admitting that the train was slightly exceeding the 10-mile limit, as provided by sec. 309, that in itself was not in my opinion negligence at this particular crossing, and certainly not the negligence that caused this accident.

I refuse absolutely to accept as true Gauley's evidence when he states that he looked and listened and did not see or hear—his sight and hearing being good—an object as large and as noisy as a freight-train of 26 cars on a bright afternoon, with a clear view of the railway from 200 to 300 feet, before he reached the crossing. Beyond doubt, if he had looked and listened he would have seen and heard the train. The excuse he offered for not seeing the train, that he must have been looking to the left, is no excuse, because a momentary glance would have satisfied him that there was no train from that direction, and in fact he could see to his left for a considerable distance without even turning his head, or at all events the slightest turn would have sufficed. For the plaintiff to argue that if he had seen the train when he was within 15 feet of the tracks at the speed he was going—12 to 15 miles per hour—he could have stopped, but could not have stopped if he had seen it within 10 feet of the crossing, and that therefore because the speed of the train was more than 10 miles per hour, the accident was inevitable, is to my mind a too problematical and uncertain basis upon which to fasten a liability for negligence on the defendants. If Gauley had seen—as he should have—the train within a distance of 15 feet southerly from the tracks and could have stopped his car, then why did he not see and why did he not stop? And I can see little use in speculating about the fact that if he had seen the train at 10 feet he could not have stopped in time to avoid the accident.

The jury did not find the rate of speed of the train. For all the Court knows the excess in speed might only have been a small fraction, and it is clear that had the train been going much faster than the statutory limit, it could not, as stated, have stopped in 1,200 feet.

Is not the meaning of the jury's findings, that if the train was going at say $9\frac{3}{4}$ or less miles per hour there would have been no

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negligence, but if going at say 10½ miles, there is negligence? Is it not pure speculation—in view of the plaintiff's own admission that he did not see the train at all, to say what he would or could have done had he observed the train, either *at 15 or 10 feet south of the crossing*? The plain meaning of the plaintiff's conduct is, that, as he did not see the train, he would have done nothing.

To me it is perfectly clear that the jury were uncertain as to what they could do with the case in view of the plaintiff's own testimony. In their answers they are silent on the question of the whistling and uncertain as to the bell ringing; and, if the plaintiff's inexcusable conduct was considered by them at all, it is difficult to understand by what process of reasoning they were able to say that the degree of the plaintiff's negligence was only 14 per cent. and that of the railway company 86 per cent. In my view, there would have been some semblance of equity if these figures had been reversed. If this had been a case of a pedestrian without looking getting into the path of an on-coming automobile at such a distance that the driver of the automobile could and should have avoided him but did not, it might be that the jury would be justified in finding negligence and contributory negligence, but in a case like the present one, where it must be found that the driver of an automobile, without looking, suddenly thrust himself into the path of an on-coming train at such a distance from a crossing as to make it impossible for the train—which, of course, is confined to its own tracks, and cannot, like an automobile, be suddenly diverted—to stop, is entirely different. I think the jury in this case, instead of basing their findings, as they were required to do, on proofs of negligence, based them largely on the probabilities of what might or might not have happened had the speed of the train been 10 miles per hour instead of slightly above that speed. I entertain no doubt whatever that the speed of the train had nothing to do with the accident but that the sole and effective cause thereof was the plaintiff's own negligence, and that the jury had no justification whatever on the evidence for their findings, and they must be reversed. The evidence of the plaintiff's negligence in this case is so glaring that I have not thought it necessary to refer in support of my conclusions to any reported cases other than *Grand Trunk Railway Co. v. Labrèche*, 64 Can. S.C.R. 15, and *Canadian Pacific Railway Co. v. Fréchette*, [1915] A.C. 871, and what was said by Lord Cairns, L.C., in *Dublin Wicklow and Wexford Railway Co. v. Slattery* (1878), 3 App. Cas. 1155, at p. 1166:—

“If a railway train, which ought to whistle when passing

through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the Judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death."

It is unfortunate that the injuries received by Miss Birkett (who was seated beside Gauley in the automobile and the only other person in it) make it impossible for her to remember anything about the accident, as otherwise the Court might possibly have had some reasonable explanation from her why Gauley did not, before reaching the crossing, observe the approaching train.

In view of my conclusions, it becomes unnecessary to discuss the action of Miss Birkett, which was by consent tried with this action.

I would allow the appeals and dismiss both actions with costs here and below.

Appeals allowed (MASTEN, J.A., dissenting).

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[APPELLATE DIVISION.]

RE GRAWBARGER AND MOYER.

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May 12.

Illegitimate Child—Inquiry as to Parentage—Children of Unmarried Parents Act, R.S.O. 1927, ch. 188, sec. 1(a)—Amendment by 19 Geo. V. ch. 23, sec. 10—Jurisdiction of District Court Judge—"Judge of the Court"—"Judge of a Court"—Motion for Prohibition.

The decision of LOGIE, J. (1929), 64 O.L.R. 630, was affirmed.

AN appeal by Herman Moyer from an order of LOGIE, J. (1929), 64 O.L.R. 630.

February 4. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

M. H. Ludwig, K.C., for the appellant. The parties lived and the cause of complaint arose in the district of Parry Sound. Under the Children of Unmarried Parents Act, the hearing of the application can only be in the district of Parry Sound, and a Judge of the District Court of Nipissing is precluded from dealing with the matter. Reference to sec. 1(a) of the Act mentioned and to the amending Act of 1929, 19 Geo. V. ch. 23, sec. 10; the Interpretation Act, R.S.O. 1927, ch. 1, sec. 28.

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J. McColeman, for the applicant, respondent, relied on the reasoning of Logie, J. The Legislature intended to provide for the convenience of the mother and child, even if the father should be penalised. Reference to *Komnick System Sandstone Brick Machinery Co. v. B.C. Pressed Brick Co.* (1918), 56 Can. S.C.R. 539.

May 12. The judgment of the Court was read by MULOCK, C.J.O.:—Ethel Grawbarger gave birth to a child born out of wedlock, and, alleging that Herman Moyer was the father of the child, applied under the provisions of the Children of Unmarried Parents Act, 1921, to the Judge of the District Court of the District of Nipissing for an appointment to inquire and determine whether Moyer is in fact the father of the said child, whereupon the said Judge issued his appointment, naming a time and place for inquiring into and determining the question in dispute. To this application Moyer filed notice disputing the jurisdiction of the said Judge to make such inquiry and determination, and moved in this Court before Mr. Justice Logie for an order prohibiting the said Ethel Grawbarger from proceeding with the said application, and in support of such motion filed his affidavit wherein he swore that he was not the father of the said child, and that “(a) the said Ethel Grawbarger and the said Herman Moyer are both residents of the district of Parry Sound and are not and never have been residents of the district of Nipissing, (b) and that the relations which the said Ethel Grawbarger alleges the said Moyer had with her and which she alleges resulted in the birth of the said child, she also alleges were had in the town of Powassan in the said district of Parry Sound and not in the district of Nipissing.”

The motion was dismissed with costs, and from such dismissal Moyer appeals to this Court.

The appellant contends that because both parties reside in the district of Parry Sound, and the cause of complaint (if any) arose in Parry Sound, therefore the District Court of Nipissing was without jurisdiction to entertain the matter. Neither the Children of Unmarried Parents Act, 1921, 11 Geo. V. ch. 54, nor the amending Acts, namely R.S.O. 1927, ch. 188, and 19 Geo. V. ch. 23, sec. 10, localise jurisdiction because of the residence of the parties or because of the place of origin of the cause of complaint, and the question to be determined is whether the Judge of the District Court of the District of Nipissing has such jurisdiction. In none of the said Acts is jurisdiction in express terms conferred upon any District or County Court Judge. The following are the only statutory provisions bearing upon the question:—

Chapter 54 of the Acts of 1921, sec. 3 (a): "'Judge' shall mean judge, or junior or acting judge of *the* county or district court," etc. App. Div.
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Section 13: "An application to the Judge for an affiliation order may be made by," etc. RE
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Section 15: "The Judge shall, upon application, appoint in writing a time and place at which he will inquire and determine whether the person said to be the father of the child is in fact the father of such child." Mulock,
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Section 18: "Where the person so served appears in pursuance of such notice, the Judge may hear and determine," etc.

Then R.S.O. 1927, ch. 188, entitled "The Children of Unmarried Parents Act," sec. 1(a), "'Judge' shall mean judge of *the* county or district court," etc.

Section 9 is in the same words as sec. 13 of the Act of 1921.

Section 11 is in the same words as sec. 15 of the Act of 1921.

Chapter 23 of the statutes of 1929, entitled "Statute Law Amendment Act, 1929," sec. 10: "The clause lettered *a* in section 1 of the Children of Unmarried Parents Act is amended by striking out all the words at the commencement thereof down to and including the word 'court' in the second line, and inserting in lieu thereof the words "'Judge' shall mean judge or junior or acting judge of *a* county or district court.'"

By the Acts of 1921 and 1927, jurisdiction was given to the judge of *the* county or district court—apparently some particular county or district court. The Legislature must have intended to change the law when by its Act of 1929 it amended the Act of 1927 by striking out the word "the" and substituting therefor the word "a." This amendment removed the previous limitation of jurisdiction to the judge of some particular district or county court and conferred it upon the judge of *a* district or county court. Unless, therefore, there is jurisdiction to-day in the judge of some district or county court the Act is inoperative. It is not reasonable to assume that the Legislature intended by the amendment to destroy the efficiency of the Act, and therefore it is the duty of the Court, if possible, to give effect to the amendment. In my opinion the only interpretation to which the amendment is open is that "*a* district or county court" means "any district or county court."

In this view, the Judge of the District Court of the District of Nipissing has jurisdiction to entertain the application, and therefore this appeal is dismissed with costs.

Appeal dismissed.

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RE CANADA STEAMSHIP LINES LTD. AND TORONTO TERMINALS
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Expropriation—Lands Taken for Railway Purposes and Harbour Development—Compensation—Arbitration and Award—Railway Act of Canada, R.S.C. 1927, ch. 170, secs. 220, 221, 223—Benefits and Advantages—Use of Slips in Navigable Waters—Leasehold Property—Compensation in Respect of Chance of Obtaining Renewal of Lease—Interest and Costs—Discretion of Arbitrator—Comparison of Site for Steamship Terminal Taken with New Site Obtained from Harbour Commission—"Special Value"—"Special Adaptability"—Amount of Award—Appeal and Cross-appeal.

The property occupied by the claimants, a steamship company, at the time of expropriation by the contestants, for the construction of a railway viaduct and harbour development, in the city of Toronto, consisted of two adjoining strips of land (and land covered with water). The westerly strip had an approximate width of 219 feet and was owned by the claimants in fee, and the easterly strip had an approximate width of 91 feet and was leasehold. The latter had been originally demised to the claimants' predecessors in title and occupancy, by a renewable 21-year lease, which had been last renewed for 21 years from the 5th June, 1903, the term thus expiring on the 5th June, 1924. In March, 1924, a further renewal was asked but refused. The fee in the leasehold property had become vested in the Toronto Harbour Commission, by conveyance from the city corporation, the former owners. Running diagonally from east to west, across both parcels, was a 66-foot reservation, known as Lake-street. This had not been actually filled in or opened as a street, but to it the claimants had no right or title, except that they were permitted to occupy and use it in connection with their steamship terminal until it should be filled in and used as a street. The claimants used the portions of Yonge-street and Scott-street which adjoined their premises as slips for their vessels. A sole arbitrator appointed, under sec. 220 of the Railway Act of Canada, to determine the compensation to be paid to the claimants for the expropriation of their property, made his award fixing the value of the freehold property, with all its riparian and water rights, and, after making due allowance for the cost of any filling that might be necessary to put it to its best use, at \$650,000. In addition, \$245,000 had been agreed upon by the parties as the fair value of the buildings, etc., making the total compensation \$895,000. The arbitrator also allowed interest at 5 per cent. from the 21st June, 1927, the date of giving up possession by the claimants, upon \$395,000, \$500,000 having been previously paid to the claimants. Both the claimants and the contestants were left to pay their own costs. The date of the filing of the plans, as of which date the compensation was to be determined, was the 4th October, 1926. The lease had therefore run out more than two years before the time at which the compensation fell to be ascertained; and the arbitrator, for that reason, made no allowance in respect of the leasehold portion of the property, save as to the buildings, etc., an allowance for which had been agreed upon, as stated above. Upon appeal by the claimants and cross-appeal by the contestants from this award:—

Held, that the claimants were not entitled to enjoy all the benefits and advantages of the harbour improvements and also to receive compensation for the taking away of privileges or advantages which they had enjoyed, but to the continued enjoyment of which they

had no legal right or claim; and their use for their vessels of the Yonge-street and Scott-street slips fell within this category.

2. That the claimants were not entitled to any compensation in respect of any benefit, either direct or indirect, which they enjoyed from the user of Lake-street and the other two streets, or by reason of their having been deprived of the same.
3. Nor were they entitled to compensation in respect of their chance of obtaining a renewal of the lease. *Syers v. Metropolitan Board of Works* (1877), 36 L.T.R. 277, applied.
4. In the matters of interest and costs the Railway Act invests the arbitrator with a discretion, which he exercised, after due consideration, and no sufficient reason was shewn for interference with his decision in those matters.
5. The arbitrator made a comparison between the claimants' old site and the new one which they purchased from the Harbour Commission, and, concluding that the new one was preferable, he decided that "special adaptability" was not a factor to be considered in fixing their compensation for the compulsory taking of the old:—*Held*, that it was the value to the claimants of their property compulsorily taken which was to be ascertained, and the fact that it had a special value to them as a steamship terminal had to be taken into consideration by the arbitrator, as it in fact was.

The doctrine of "special adaptability" was not properly applicable—it was "special value" that had to be considered.

"Special value" refers to the present use of land, and means its added worth to the owners for the actual and peculiar use to which it is being put and for which it is specially fit: while "special adaptability" refers to an apparent but future use to which the property may be put.

The arbitrator followed the proper course in comparing the respective advantages of the old site with those of the new, and his conclusion was the right one.

Review of the authorities upon the question of "special adaptability." *Cedar Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569, and *Re Schooley and Lake Erie and Northern Railway Co.* (1915), 34 O.L.R. 328, specially referred to.

The total amount awarded was sufficiently liberal to include an allowance for business damage and the cost of moving; and the arbitrator's conclusion as to the amount awarded should not, upon the cross-appeal of the contestants, be disturbed.

APPEAL by the claimants, the Canada Steamship Lines Ltd., the Prudential Trust Company Ltd., the Royal Exchange Assurance Company Ltd., and the Montreal Trust Company Ltd., and cross-appeal by the contestants, the Toronto Terminals Railway Company, from an award made by ORDE, J.A., as arbitrator, fixing the compensation to be paid to the claimants by the contestants for lands expropriated for the construction of a railway viaduct and for harbour development in and about the City of Toronto.

February 17, 18, 20, and 21. The appeal was heard by MULLOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

The Hon. N. W. Rowell, K.C., Ward Wright, K.C., and F. Wilkinson, for the claimants. The claimants are entitled to

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special value on account of the special adaptability of the property as a steamship terminal. The property has been used as a steamship terminal since 1841. In determining the value of the property, the long user ought to be taken into consideration: *In re Lucas and Chesterfield Gas and Water Board Ltd.*, [1909] 1 K.B. 16, at pp. 28 and 29; *Pastoral Finance Association Ltd. v. The Minister*, [1914] A.C. 1083, at pp. 1087 and 1089; *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, at pp. 24-30; *Cunard v. The King* (1910), 43 Can. S.C.R. 88, at pp. 99 and 100. The Crown could not fill in the Yonge-street and Scott-street docks while the claimants were in possession, and so destroy the special public right of navigation of the steamship company: *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662, at p. 671; *North Shore Railway Co. v. Pion* (1889), 14 App. Cas. 612; *Re Snow and City of Toronto* (1924), 56 O.L.R. 100, at p. 105. The fact that the claimants were able to purchase a site close by does not take away the special adaptability of the old property. The evidence did not warrant the arbitrator holding that this property was not specially adaptable as a steamship terminal. The learned arbitrator erred in not compensating the claimants for the loss of their interest in the leasehold property. An element to be considered in determining the value of property bordering on water is the owner's riparian rights. No allowance was made for the claimants' riparian rights. The claimants were forced to quit the old site in the month of July, which is their busiest season; as a result, they suffered a substantial loss of business. The learned arbitrator did not include in the award an allowance for this loss of business. The claimants are entitled to recover \$20,700, being the amount paid by them in order to hasten the completion of the new premises. This money was spent solely to accommodate the convenience of the contestants. By sec. 221, subsec. 3, of the Railway Act, R.S.C. 1927, ch. 170, the arbitrator may include in the award an allowance for interest on the compensation from the date of the deposit of the plan. He did not do so in the present case. He merely allowed interest from the date when the possession of the last piece of property was given. By sec. 223 of the Railway Act, the costs of the arbitration shall be in the discretion of the arbitrator. This is a legal discretion. When the amount allowed is larger than the amount offered, the costs of the arbitration should be given to the claimant. The learned arbitrator erred in not allowing costs to the claimants.

W. N. Tilley, K.C., Angus MacMurchy, K.C., and S. J. Dempsey, for the contestants, contended that the Toronto Harbour Com-

mission was under no obligation to improve the property east of Yonge-street at the time of the expropriation; whereas the waterfront west of Yonge-street had all been improved by this time, and so the property to the west of Yonge-street is more adaptable as a steamship terminal than the property to the east of Yonge-street. The railway tracks in front of the old site detracted from its suitability as a steamship terminal. If the boats are properly tied, the new property is as suitable for wintering them as the old site. The claimants had been corresponding with the Toronto Harbour Commissioners since 1919 regarding a new site. They knew since that time that their lease of the old property would not be renewed, and so they cannot set up that they are entitled to compensation for the leasehold property. Since 1908 the claimants were under an obligation to fill in Lake-street; therefore they had no riparian rights as far as it was concerned. While the steamship company have no riparian rights at the new site, they have entered into an agreement with the Toronto Harbour Commission, which is more beneficial to them than riparian rights. The claimants are entitled to interest on the amount of compensation granted from the date upon which the contestants entered into possession of the old site, and not from the date of the deposit of the plan.

Rowell, K.C., in reply. The award of the arbitrator is to be treated in the same manner as a verdict of a jury, and it cannot be set aside unless the arbitrator proceeded on an erroneous view of the law: *Lacoste v. Cedar Rapids Manufacturing and Power Co.* (P.C.), [1928] 2 D.L.R. 1, at pp. 11 and 12. The question of amount is solely for the arbitrator to determine, and his award cannot be set aside merely on the ground that it is against the weight of evidence.

W. N. Tilley, K.C., in reply (on the cross-appeal), argued that the *Lacoste* case applies only to the Province of Quebec. It is within the jurisdiction of the Court of Appeal to review the award and decide whether the arbitrator has made a reasonable estimate of the evidence: *Atlantic and North-West Railway Co. v. Wood*, [1895] A.C. 257; *James Bay Railway Co. v. Armstrong*, [1909] A.C. 624. Section 232 of the Railway Act provides that the appellate court may review the evidence taken at the arbitration and may increase or decrease the amount of the arbitrator's award.

May 12. The judgment of the Court was read by GRANT, J.A.:—An appeal by the claimants and cross-appeal by the contestants from an award, dated the 31st August, 1929, made by Orde.

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J.A., as sole arbitrator appointed, under sec. 220 of the Railway Act of Canada, to ascertain and determine the compensation to be paid to the claimants in respect of the expropriation of their property on the Toronto harbour front, for and in the course of the construction of the railway viaduct and harbour development. The learned arbitrator fixed the "value of the freehold property, with all its riparian and water rights, and after making due allowance for the cost of any filling that might be necessary to put it to its best use, at \$650,000." In addition, the sum of \$245,000 had been agreed upon by the parties as the fair value of the buildings, etc., making the total compensation \$895,000. The learned arbitrator also allowed interest at 5 per cent. from the 21st June, 1927, the date of the giving up of possession by the steamship company, upon the sum of \$395,000, as \$500,000 had previously been paid to that company. Each party was left to pay its own costs, as, in the arbitrator's opinion, success had been divided. A portion of the premises occupied by the steamship company was of leasehold tenure, the lease in respect thereof having expired on the 5th June, 1924, and a renewal thereof having been refused. The date of the filing of the plans, as of which date the compensation was to be determined, was the 4th October, 1926, the notice of expropriation being given on the 25th November, 1926. The lease had therefore run out more than two years before the time at which the compensation fell to be ascertained. The learned arbitrator, for that reason, made no allowance in respect of the leasehold portion of the property, save as to the buildings and other improvements thereon, for which provision was made by the lease, and as to the amount of which the parties had arrived at an agreement, as already mentioned.

The claimants' appeal was presented before this Court as based upon the following grounds, namely:—

1. That the learned arbitrator had found against their claim for special adaptability.

2. That he had made no allowance to them in respect of their leasehold.

3. That he failed to take into consideration their possible right to obtain a new water-lot outside of the new Windmill line.

4. That he refused them any allowance for business damage.

5. That he allowed interest only from the date of the giving of possession of the last of the property, instead of from the date of expropriation.

6. That he allowed them no costs; in all of which matters, they submitted that he was in error; and

7. That, even if he were right in all of the above matters, the amount which he allowed was too small.

The railway company cross-appealed upon the ground that the amount of compensation allowed was excessive.

In the reasons for the award will be found a narrative of the events, and a statement of the facts and circumstances which led up to the arbitration proceeding. These need not be repeated here, save in so far as may be necessary to an understanding of the questions raised on the appeal, and of the views which may be expressed thereupon.

The property occupied by the claimants, at the time of the expropriation, consisted of two adjoining strips of land (and land covered with water) lying between Yonge-street and Scott-street produced southerly, and extending from the Canadian Pacific Railway right of way southerly to the new Windmill line in Toronto Harbour; the westerly strip, having an approximate width of 219 feet at the Canadian Pacific Railway boundary, being owned in fee; and the easterly strip, having an approximate width at the same limit of 91 feet, being leasehold. Yonge-street, produced, lay on the west, and Scott-street on the east. The whole is shewn on a plan filed as exhibit 5, in which the location can also be seen. The leasehold had been originally demised to the claimants' predecessors in title and occupancy, by a renewable 21-year lease, which had been last renewed for a term of 21 years from the 5th June, 1903, which term therefore expired on the 5th June, 1924. In March, 1924, the steamship company notified the Toronto Harbour Commission of their desire to renew for a further term of 21 years, but renewal was refused. The fee in the leasehold property had become vested in the Harbour Commission, by conveyance from the city corporation, the former owners. Running diagonally from east to west, across both parcels, was a 66-foot reservation, known and appearing upon the plan (exhibit 5) as Lake-street. This had not been actually filled in or opened as a street, but to it the steamship company had no right or title, except that they were permitted to occupy and use it in connection with their steamship terminal until it should be so filled in and used as a street.

As the rights and obligations of the claimants with respect to Yonge-street and Scott-street, extended, and covered with water, and Lake-street, running across their premises, have a material bearing upon the issue in the arbitration, it is convenient to deal with these phases of the matter at this stage.

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The claimants used those portions of Yonge-street and Scott-street which adjoined their premises on the west and east sides respectively, as slips, bringing their vessels in and out of the same to and from their berths. The Scott-street slip was on the east side of the leasehold property, with which I shall deal later. In other respects, the claimants had, at the best, no higher right in respect of the Scott-street slip, than they had in regard to the slip at Yonge-street.

With respect to the latter, we were not referred to any contract, or agreement, statutory or otherwise, by which the city corporation was prevented from filling it in. The claimants had filled in or built over their own lands (covered with water), including the lands held under lease, out to the old Windmill line, and in part, by their piers, out nearly to the new Windmill line. They had no riparian rights with respect to these slips. Any rights which they possessed in law were enjoyed by them merely as members of the general public, in respect of navigation. Having obtained and exercised the privilege of interfering with navigation by the filling in of their own water-lot in whole or in part, it is not to be supposed that any objection which they might urge to the granting of the like privilege to the adjoining owner would be listened to with patience, much less with favour, if they had the hardihood to put forward such an objection. In justice to the claimants' counsel, I should state that I did not understand them to present such an argument to us. Their contention was rather that, as the harbour was for shipping, and the city desired to foster and develop the shipping industry, there would be no sense in filling in the Yonge and Scott-streets slips, and thereby hampering this company engaged in that business.

The city and its grantee, the Harbour Commission, are undoubtedly desirous of developing shipping, and the harbour is for that purpose, but not for the individual benefit of the steamship company, nor to serve its interests at the expense of the general public. A considerable portion of the argument addressed to us by counsel for the claimants, upon this and some other phases of the matter, appeared to be based upon the view that the claimants were to receive and enjoy all the benefits to be derived from the harbour improvements, but that, wherever these might come near to or affect the location in which the claimants were carrying on their business, everything must be left as it had been, irrespective of the question whether the claimants had any legal right to its being so left, or not. Of course it was not expressed in so bald a manner, but the claimants did not appear to apprehend clearly

that they could not expect to enjoy all the benefits and advantages of the harbour improvements, and also receive compensation for the taking away of privileges or advantages which they had enjoyed, but to the continued enjoyment of which they had no legal right or claim. Their use of the Yonge-street and Scott-street slips fell within this category, and I quite agree with the views expressed by the learned arbitrator in that regard.

The position respecting Lake-street is set out in exhibit 6 (p. 75 *et seq.* of the appeal-book), the agreement regarding the moving outward of the Windmill line (see particularly pp. 77 and 78). Under the terms of that agreement, the claimants (like other owners of properties traversed by the street reservation) were to be permitted to occupy and use the portion crossing their property until the city desired to fill it in and use it. The claimants were not given any fixed period for such occupancy, and could be at any time required to give it up. They had no rights in respect of it or their user of it, for which they could make any claim for compensation. I am, of course, not referring to their buildings or other improvements.

The harbour development necessitated the extension of the pier head-line out to deep water, as, without the very extensive blasting of rock, no sufficient depth of water could be obtained at the then existing docks or piers to take care of deep-draught vessels. The filling in of Lake-street, as well as the Yonge and Scott-street slips, was a practical certainty, and there was no reasonable probability of the claimants being allowed to continue in the enjoyment of privileges and user to which, as already stated, they had no legal right. I quite agree with the conclusion reached by the learned arbitrator, that the claimants are not entitled to any compensation in respect of any benefit, either direct or indirect, which they enjoyed from the user of these three streets, or by reason of their having been deprived of the same.

As already stated, a portion of the premises occupied by the claimants was of leasehold tenure, and the lease had expired two years or so prior to the date as of which the amount of compensation was to be ascertained.

By the terms of the lease, the claimants were entitled to be paid the value of their improvements, and the amount to be so paid had been agreed upon between the parties. Further, the lease provided that the claimants should be permitted to remain in possession of the leasehold premises, at the same rentals, until the publication of an award fixing the amount to be paid for such improvements, in an arbitration to be held for such purpose. The

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claimants having agreed upon the amount to be paid to them for their improvements, an arbitration to fix such amount was rendered unnecessary; and, having been paid a sum double the amount so agreed upon, the claimants gave up possession. They no longer had any right, estate or interest, either legal or equitable, in or in respect of what had been their leasehold premises. But they say that the refusal to renew their lease in 1924 was in reality a step in the harbour improvement scheme; that, but for such scheme, their lease would have been renewed; and, therefore, as the quantum of the compensation cannot, on principle, be either increased or diminished by any effect produced by the scheme itself, they are entitled to have the possibility or probability of their obtaining a renewal of the lease considered as a factor in summing up the amount of the compensation.

That contention does not commend itself to my mind, nor, in my opinion, is it supported by the principle invoked in its behalf. It is well established in law, and commends itself to one's sense of what is equitable, that a body, invested with expropriatory powers, should not be permitted to take some step or measure, within its lawful rights, whereby the property to be taken would be depreciated in market value, and then take the property over at the price so depressed. *Re Gibson and City of Toronto*, 28 O.L.R. 20, affords an illustration of this. But, in all such cases, what is pointed to as a part in the scheme is some active movement or step which has a direct effect or bearing upon the property which is being expropriated. I do not know of any authority which goes the length of holding that an expropriating body may be penalised by being restricted in or made to pay extra for doing what it wishes with its own property, merely because it was expropriating the adjoining property. The matter of the harbour development had been under consideration at least for 20 years or more, and would doubtless have been proceeded with at an earlier date had the war not intervened. However that may be, all the parties must have known that there was no reasonable probability that the lease in question would be renewed, as the continued use of the location would be utterly incompatible with the harbour development. As a matter of fact, there was no probability of any further renewal being granted, even if that could be relied upon as an element in fixing compensation, which, in my opinion, it could not. The mere chance or expectancy of renewal of a lease, without any right in law to insist upon it, is not a ground for compensation.

Whether or not a lessor will renew must, in the ordinary case, be pure speculation. Under the Lands Clauses Act in Eng-

land, it has been held that such an expectancy of renewal is not to be considered in fixing compensation: *vide* Halsbury's Laws of England, vol. 6, p. 34, and cases in foot-note (1).

It has further been held that promoters may acquire the freehold and then give the necessary notice to quit to the lessee, thereby terminating the tenancy, and that under such circumstances no compensation can be claimed by the lessee: *Syers v. Metropolitan Board of Works* (1877), 36 L.T.R. 277, a decision of Jessel, M.R., affirmed by the Court of Appeal. It could only be by analogy to the right to receive compensation in respect of some potentiality attaching to the claimants' property that such a claim could possibly be set up, if it could reasonably be set up at all (which I doubt); but in this case the claimants had no property to which it could attach, because their lease had previously expired. And this applies also in respect of the claimants' effort to utilise the expired leasehold and their chances of obtaining a renewal thereof, as a factor operating in support of their claim for special adaptability, with which I have later to deal. In my view, therefore, the learned arbitrator was right in declining, when fixing compensation, to consider the claimants' chance of obtaining a renewal of the lease.

In the two matters of allowance of interest and costs, the statute invests the arbitrator with a discretion, which he has exercised, after due consideration, and no sufficient reason has been advanced to us for any interference with his decision in that regard.

The main ground upon which the claimants' appeal was presented was that the learned arbitrator was in error in ruling out special adaptability as a material factor in the issue before him.

Counsel state, in effect, that the arbitrator made a comparison between their old site and the new one which they purchased from the Harbour Commission, and, having concluded that the new one was preferable, he thereupon decided that special adaptability was not a factor to be considered in fixing their compensation for the compulsory taking of the old.

Before proceeding to consider the course followed in the arbitration and by the learned arbitrator in reaching his conclusions as disclosed in his reasons for the award, it may be of assistance to consider what is meant by "special adaptability," and, briefly, to what cases it is appropriate.

In *Cedar Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569, at p. 576, when delivering the judgment of the Judicial Committee, Lord Dunedin says:—

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"The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, where Vaughan Williams and Fletcher Moulton, L.JJ., deal with the whole subject exhaustively and accurately."

Turning then to the *Lucas and Chesterfield* case, which is thus expressly approved by the Judicial Committee, I find that Vaughan Williams, L.J., on p. 26 of [1900] 1 K.B., cites with approval the language used by Grove, J., in *In re Countess Ossalinsky and Manchester Corporation* (1883), not reported, where, after referring to the fact that the arbitrator in that case had taken into consideration the enhanced value of the land in question on account of its capability of being used for diverting and impounding water or of being converted into a reservoir, that Judge stated:—

"It appears to me that that in itself is not an objection to the award, and that the arbitrator ought to take that into consideration. If the land has what I may call an adventitious value, that is, something beyond its mere agricultural or normal value—and that is a marketable value in this sense, that persons wishing, for a purpose for which the land is peculiarly applicable, to purchase that land would give a higher price for that land—then the arbitrator has a fair right to take that into consideration; it is a matter no doubt contingent, but still it is a matter which is not to be ignored or put out of consideration by an arbitrator."

Vaughan Williams, L.J., goes on to state that, "after giving illustrations of this contingent value arising from adaptability which he says ought to be taken into consideration by the arbitrator, he (Grove, J.) goes on with these words: 'It is quite another case when you come to the second head of objection here, namely, the particular value which the land is to one of the parties before the arbitrator. That is quite another ground. But supposing the general value is only given, if this land was probably certain, within a reasonable time, to be used for certain purposes which would give it a very much enhanced value, that is a matter for the arbitrator to take into consideration. I am clearly of opinion that it is, and that the arbitrator has rightly taken that matter into consideration . . . it has been the invariable practice sanctioned by the Courts that arbitrators are not to value the land with reference to the particular purpose for which it is required, particularly

where the matter is under parliamentary powers with reference to what the parties who are taking the land under compulsory powers are obliged by their necessities, or what they suppose to be their necessities, to pay for it there—that it is to be excluded from consideration, and the only way it can or ought to be put forward at all is as a possible illustration of the probability of the land being useful for such a purpose. You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put land to when they take it under parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary, but are schemes with certain probability in them. I do not see any objection to that being used as an argument.’”

Vaughan Williams, L.J., proceeds further in these words (pp. 27 and 28):—

“In the present case I do not think that either side take any exception to the law laid down by Grove, J., in reference to special adaptability being an element which the probability of purchasers requiring the land for such purposes gives to the land compulsorily taken for such purposes.”

And further on he states:—

“It may be that the adaptability of the land for the purpose of enlarging the reservoir was so unique that he will give a value little less than that which he would give if dealing with the realized possibility. But in my judgment he ought to value the possibility and not the realized possibility.”

On pp. 30, 31, and 32, Fletcher Moulton, L.J., gives utterance to the following statements upon the same subject:—

“At a very early date in the history of this branch of the law there arose what is known as the question of ‘special adaptability.’ The phrase is not a happy one, for special adaptability for some purpose or other is the very basis of the market value of all land, except, perhaps, land that in all respects falls below the average. In agricultural land extra fertility, in town lands advantages of site, are true cases of special adaptability for farming or building purposes. These tend so directly to increase both the value and the market price of lands in the hands of a private owner that it has never been doubted that he could urge them in augmentation of the compensation which he was entitled to receive. The question has arisen only in the cases where the special adaptability is for

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purposes for which lands are required only when used for works of public utility, which are naturally different from the uses to which lands are put while in private hands, and which therefore do not necessarily influence the price which such lands command in the market. Ought the owner to be entitled to higher compensation by reason of the, to him, useless peculiarities which the lands possess?"

Page 31:—

"The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes."

Page 32:—

"There is, therefore, nothing unreasonable in considering that in certain cases land specially suited for such purposes might fairly become in private hands the subject of competition between rival public authorities desirous of getting the advantage of that special suitability; and, this being so, the tribunal assessing the compensation would be entitled, and bound, to consider what is the fair market value so arising, and, if it be greater than that obtained by taking it as purchased for ordinary uses, to give to the seller the larger of the two. As I read the award of the umpire, he has specifically found as a fact that there exists such a special suitability in the lands in question, and that there also exists such a possible competition in the district in respect of the supply of water as would entitle him to estimate the compensation in the way I have described, and it is not contested that there was evidence on which he could so find."

Adverting to *Cedar Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569, Lord Dunedin, on p. 576, uses the following language upon the same subject:—

"Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agri-

cultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton, L.J., in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility."

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In *Sidney v. North Eastern Railway Co.*, [1914] 3 K.B. 629 (a decision which has frequently been cited with approval and followed), Rowlatt, J., at p. 636, discusses "special adaptability" as follows:—

"But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.

"Special adaptability is an expression which is wide enough to include special adaptability for any purpose, but where the special adaptability is for purposes other than those of the compulsory purchaser it is merely an element in the calculation of the probable competition for the land, that is, an element in its general value. It only gives rise to a question in compensation law, where, existing for the purposes of the promoters, its consideration seems at first sight to infringe the principle that value due to the scheme is to be excluded. For example, a piece of land may have special value for a particular crop, for a particular sort of building scheme, or for a reservoir, or for several of these purposes. But if it is going to be taken for an artillery or rifle range, or for a railway, these are elements of general value only and raise no question. Suppose, however, it is to be taken for a reservoir, its special suitability for that purpose (being the purpose of the scheme) does raise the question how far that can be taken into consideration without infringing the rule against giving value due to the scheme. It is quite clear that special adaptability for the purposes of the particular scheme may be taken into consideration where it can be said that there might have been other competitors for it for that purpose, and to the extent that the competition of such possible purchasers with each other and with the promoter would raise the possible price that might have been obtained in the market."

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Many other expressions of opinion by eminent Judges might be quoted, from all of which it is apparent that "special adaptability" is an expression used to denote some purpose for which the land in question is peculiarly suitable, and for which purpose it is reasonable to believe that such land might find a market. The expression is not applied in any case to a use to which the land is at present being put, but rather to some use to which the land might reasonably be expected to be put in the future, and for which it is peculiarly suitable, or adaptable. The very form of the word "adaptability" predicates some use to which it may be expected to be devoted in the future, as distinguished from a use to which it is at present being put. It seems to me manifest that, in the sense in which the expression has been used in the decided cases, it has no application whatsoever to the facts of the case before us. That which the claimants are putting forward as a basis upon which the compensation should be estimated is the "special value" of the property to themselves; that is, its "special value" for the very purpose for which they are using it; and not in any sense "special adaptability" for some contingent use in some other line of industry or endeavour, whether it be that contemplated by the takers or otherwise.

It has been stated, times without number, that the law is that property compulsorily taken is to be paid for on the basis of its value to the owner. The two basic propositions of law are those laid down by Lord Dunedin in the *Cedar Rapids* case, [1914] A.C. at p. 576:—

"(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined."

It was therefore the value to the claimants of this property which was to be ascertained, and the fact that it had a special value to them for the purposes of a steamship terminal had to be taken into consideration by the arbitrator, and, as I read the reasons for his award, that is just what the learned arbitrator did. The claimants complain that the learned arbitrator allowed them nothing for "special adaptability." As stated above, the doctrine (if it may be so called) of "special adaptability" was not properly applicable to the present case at all. It is a question of "special value" not "special adaptability." I notice that Hodgins, J.A., calls attention to the distinction between these two expressions in

Re Schooley and Lake Erie and Northern Railway Co. (1915), App. Div.
34 O.L.R. 328, at the top of p. 333, where he states:— 1930.

“For the sake of clearness it may be mentioned that ‘special value’ refers to the present use of land, and means its added worth to the owners for the actual and particular use to which it is being put, and for which it is specially fit: while ‘special or exceptional adaptability’ refers to an apparent but future use to which the property may be, but is not now, put, and for which it is particularly adapted.”

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In that case the property was being used by an ice company in connection with its business of cutting and selling ice, for which it was specially fitted and suitable, as in the present case the land (and land covered with water) are being used by the claimants for a steamship terminal, for which it is specially suitable.

When one reads the reasons for the award, having this in mind, one understands readily what is meant by the learned arbitrator when he states:—

“When the actual circumstances of this case are fully considered, the claim for additional compensation on the ground of special adaptability largely, if not wholly, disappears. All or nearly all of the elements which go to make up the special advantages claimed by the steamship company are destroyed or badly shattered by the nature of the company’s title to the old site and by the fact that the company was able to acquire a nearby site possessing many of the advantages of the old one. The steamship company is not really in a position differing very much from that of a shopkeeper upon a strategic corner who, when ousted from it, acquires a new shop across the street.”

The claimants acquired from the Harbour Commissioners a new site for their steamship terminal, out at the new pier head line, at deep water, capable of admitting vessels of deep draught, such as may be expected to use the new Welland canal, and the St. Lawrence waterway, if and when that becomes an accomplished fact. The learned arbitrator, in considering the evidence adduced before him, very naturally and, in my opinion, quite properly, kept before his mind not only the old site for which the claimants were to be compensated, but also the new site to which the claimants moved their terminal. The course which he followed in that regard was the one laid out for him by the parties themselves, and particularly the claimants, by the manner in which their case was put before him.

I find, upon a perusal of the testimony given by Mr. Enderby,

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the general manager of the steamship company, in answer to questions put to him by their counsel for the purpose of eliciting the information which was given, that he made comparisons between the old and the new sites. On p. 92, Mr. Rowell, the claimants' counsel, asks this question:—

"Then, Mr. Enderby, I want to ask you this: how does the present site or any other possible site . . . how do the two sites compare from the standpoint you have mentioned before of the advantage of your own site in location and suitability for summer operation and winter operation? A. The old site is very much preferable.

"Q. Well, now, just explain to his Lordship why. A. Well, the new site is very badly exposed from a weather point of view. It is difficult to operate steamers at that terminal during the season of operations in anything approaching a blow."

Again at the foot of p. 93 and top of p. 94, at the request of the company's counsel, he compares the new and the old sites as to the effect of the surge of the waters on vessels at their berths.

On p. 92 Mr. Rowell asked him:—

"Now, will you compare the berthing space which you had in your old site with the berthing space you have at this new passenger terminal? A. We had berthing facilities for 6 steamers at any time.

"His Lordship: Q. In the old site? A. At the old site.

At the new site we have berthing facilities for 4 steamers only, and no chance to increase that number."

Again at pp. 105, 108, 110, 111, and on nearly every page up to 120, the comparison is continued between the new and the old sites.

The same course was followed with other witnesses called by the claimants, and, indeed, a very large proportion of the evidence to which our attention was specially directed by counsel upon the argument of the appeal was devoted to a comparison between the new and the old sites, upon the question of their respective values as steamship terminals.

When the learned arbitrator came to deal with the subject of what was called "special adaptability," he took up the various features which had been emphasised by counsel for the claimants in the presentation of the evidence, and, following the course which had been adopted by counsel, he compared the old and the new sites with regard to such particular features, and it is quite evident, in my opinion, that throughout the reasons for his award the learned

arbitrator dealt with these aspects of the matter upon the basis of the special value of the old site to the owners, the claimants, for the purposes of their business as a steamship company, which was the basis upon which they had presented their claims for compensation; and, when the learned arbitrator, in dealing with certain of the features specially emphasised, after making the comparison as above mentioned, stated that the claim for "special adaptability" fell to the ground, or that it largely if not entirely disappeared, or that it was fully compensated for by other advantages of the new site, etc., etc., he was merely stating in effect that by acquiring the new site in place of the old, the claimants, to the degree stated, would be compensated for the special loss which they had sustained.

The idea in the mind of the learned arbitrator is, I think, evident from the language used by him at the bottom of p. 46 and top of p. 47 of the appeal-book:—

"Now, there can be no doubt that the claimants are entitled to be compensated for their property upon the basis of its value to them with all the advantages inherent in the property arising from its special adaptability for the business to which the steamship company has devoted it, and that, upon the question of adaptability, the question whether or not other available sites are procurable ought to be considered. If the old site had been wholly freehold, and the title of the steamship company were not complicated by the reservation of Lake-street, and the ownership by the City of Toronto of the extensions of Yonge and Scott-streets, and the expropriation had resulted in the absolute loss by the company of all its terminal facilities at Toronto, the question of its special value to the company would present itself in its simplest form. There would unquestionably be in such case a right to compensation over and above the bare value of the land itself, and the only difficulty would be to fix that additional value. Here the problem is not so simple as that, and is greatly complicated by the nature of the company's title and the fact that the company has acquired a new site for its terminals not very far from its old one, and possessing many advantages which may counterbalance some of those lost with the old one."

Some of the special features which were pressed upon the argument of the appeal, with respect to the property taken, were: its sheltered position; its accessibility; its advertising value; the possibility of enlarging it by extending the piers farther out upon the water-lot; and the riparian right.

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These were all duly considered by the learned arbitrator with a view to the special value attaching thereby to the claimants' property. With respect to some of them he does not state that they did not add value to the property, but, evidently having in mind the price which was paid by the claimants for their new site, with all its special advantages, he compared these special features of the old property with the corresponding or other advantages of the new property, in order that he might be able, from the price paid for the new, to obtain concrete evidence upon which to estimate the compensation to be given to the claimants for the property taken from them.

In my opinion the learned arbitrator was fully justified in following this course. The claimants treated with the Harbour Commissioners for the new site at the new pier head line. The one which they acquired apparently was the one most nearly resembling that which they were giving up, except that, of course, like all other new sites in the harbour, it was out at deep water. The price paid by the claimants for such new site or arrived at between themselves and the Harbour Commission, in my opinion afforded the best evidence available, of a practical concrete character, upon which to estimate the value of the old site. I think, therefore, that the learned arbitrator was following the proper course in comparing the respective advantages of the old site with those of the new, and I agree with the views which he expressed with reference to their corresponding advantages and disadvantages.

Upon the questions of sheltered position and accessibility, there is a further aspect of the matter worthy of mention. It goes without saying that the whole development of the harbour out to the new pier head line would not be held back merely because one owner, the steamship company, did not wish the development to proceed. It would follow that the rest of the harbour would be extended, and it is not to be supposed for one moment that the steamship company would be content to retain its old site with 14 feet of water, and no possibility of accommodating the deep draught vessels which would be coming into the harbour while all the rest of the harbour was enjoying the benefits of 25 or 30 feet of water at the pier heads. Supposing that such a situation did exist, there is not the slightest question but that the steamship company would fill in and extend its property out to the new pier head line, whereupon, in the matters of accessibility and sheltered position, it would be situated exactly as it is now, at its new site.

One of the grounds of appeal pressed before us was that the learned arbitrator failed to take into consideration the claimants' possible right to obtain a new water-lot outside of the new Wind-mill line. That this is not an accurate statement of the attitude of the learned arbitrator will be found on a perusal of his reasons for the award at p. 57, where he deals specifically with that feature of the matter. He was of opinion that there was not any great probability of their having been able to obtain a new water-lot, under the special conditions which obtained in this case in view of the harbour development, but he did not deny it altogether. On the contrary he said that "if that possibility enhances the present or potential value of the freehold property at all, such added value falls far short of the sum claimed, namely, \$300,000. And the value of that possibility completely disappears in the face of the fact that the company has acquired a new site with piers out to the new harbour line."

In the view thus expressed I entirely concur, having in mind the remarks of the learned arbitrator when dealing with the evidence of Mr. Poucher, the expert valuator called on behalf of the railway company, who, he stated (at the top of p. 65) "rather tended to underestimate the inherent value of the water-frontage and the water-lot," and also the further language used at the bottom of p. 65 and top of p. 66, where he states:—

"I am of the opinion that, even for the comparatively narrow frontage of 212 feet, the value of the water-rights attaching to the ownership of both the riparian lands and the water-lot were such as to increase substantially the bare value of the land itself as a site for shop or industrial buildings. There would be many uses to which the land might be put for which access to and from a water-front of 212 feet would be very valuable."

Viewing the whole matter in the light of the arguments advanced by counsel, and of the evidence to which our attention was specially directed, all of which, with many other pages, I have carefully read and considered, I am strongly of the opinion, as already expressed, that the sale by the Harbour Commissioners to the steamship company of the new site affords the most satisfactory evidence available upon which to estimate, by comparison of the advantages of the two, the amount of the compensation to be paid to the claimants for the taking of their old terminal.

I am further of opinion, upon all the evidence, that when the learned arbitrator fixed the amount of the compensation to be paid at the sum of \$650,000 he dealt very generously with the claimants.

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Counsel for the steamship company complained that the arbitrator did not make them any allowance for business damage or for the cost of moving (\$4,200). While I might not agree with the view expressed by the learned arbitrator, that the cost of moving should be treated as being incidental to the acquisition of the new site, and not as damages resulting from the expropriation of the old one, yet in my judgment the total amount awarded was quite sufficiently liberal to include these items, and I would not increase the amount awarded.

On the other hand, with respect to the cross-appeal of the railway company, as the arbitrator heard the witnesses, and very evidently gave the matter most careful consideration, I would not be disposed to disturb his conclusion as to the amount awarded.

In the result, I would dismiss both the appeal and the cross-appeal, each with appropriate costs.

Appeal and cross-appeal dismissed.

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May 12.

RE ROMAN CATHOLIC EPISCOPAL CORPORATION OF LONDON AND
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Expropriation—Strip of Land Taken by Municipality for Widening Street—Compensation—Award—Value of Land—Evidence—Advantage to Land not Taken—Municipal Act, sec. 324(1)—Sales of Property in Neighbourhood—Offer for Block of which Strip Taken Formed Part.

Fixing the amount of compensation to be paid by a town corporation to the owner of land for a strip expropriated for the purpose of widening a street, the arbitrator awarded \$11,424, being at the rate of \$4,000 per acre. Conflicting expert evidence as to values was adduced. The arbitrator accepted the calculation of the expert witness P., which was to the effect that the taking of the strip caused no damage to the land not taken, but was an advantage to it, and he deducted the increase in value from the value of the land taken and thus arrived at \$4,000 per acre.

By sec. 342(1) of the Municipal Act, R.S.O. 1927, ch. 233, a claimant is entitled to compensation for the land taken without any deduction because of advantage to the land not taken. What sum P. deducted because of such advantage did not appear:—

Held, by the majority of the Court, upon appeal from the award, that the conclusion to be drawn from P.'s evidence was that, in his opinion, the land taken was worth more than \$4,000 an acre—how much more did not appear; but the evidence as to sales of property in the neighbourhood, and the evidence of a previous offer of \$6,000 an acre for the property of the claimants, which they refused because too low, established that the claimants' property was worth to them at least \$6,000 an acre; and the compensation was increased to \$17,126.

Per HODGINS, J.A., dissenting:—It is not clear from the evidence whether the offer of \$6 000 an acre was a firm and enforceable offer if accepted; and an offer for the whole of an extensive block, containing a large number of acres, is not a proper standard by which to judge the value of a strip 16 feet wide along its front or side.

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AN appeal by the Episcopal Corporation and others, claimants, from an award made by COUGHLIN, Co.C.J., as arbitrator, fixing the compensation for lands of the claimants expropriated by the Corporation of the Town of Sandwich.

April 1. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

W. N. Tilley, K.C., for the appellants.

John Sale, K.C., for the town corporation, respondents.

May 12. MULOCK, C.J.O.:—This is an appeal from the award of his Honour J. J. Coughlin, Judge of the County Court of the County of Essex, fixing the amount of compensation to be paid by the Municipal Corporation of the Town of Sandwich to the claimants, for the taking from them of certain lands in that town.

The learned arbitrator awarded as compensation the sum of \$11,424, being at the rate of \$4,000 per acre, and the appellants appeal, contending that the amount awarded is inadequate.

The claimants owned a block of land containing about 44 acres, being part of farm lot No. 63 in the 1st concession of the township of Sandwich, extending from the Essex Terminal Railway to Tecumseth-street along the east side of Huron-street, having a frontage on Huron-street of 3,325 feet, the expropriated portion thereof consisting of a strip 36 feet wide, and containing in area 2 acres and 856/1000ths of an acre. Huron-street was 50 feet wide, and the strip was expropriated in order to widen it to 86 feet.

The reference was conducted with eminent fairness. The learned arbitrator had the advantage of being familiar with the district in question, and he has fully set forth the reasons for his award. Under these circumstances, I regret finding myself unable to accept his conclusions.

Conflicting expert evidence as to values was adduced, and in his reasons for his award the learned arbitrator says: "I accept Mr. Page's calculation of \$11,424 as representing full compensation to the owners for the land taken, as well as for damages to the land remaining, and I award that amount to them."

Mr. Page's evidence was to the effect that the taking of the strip caused no damage to the land not taken, but on the con-

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trary was an advantage to it, and he deducted such increase in value from the value of the land taken and thus arrived at \$4,000 per acre, which, moneyed out for the land taken, amounted to \$11,424.

Under the Municipal Act, R.S.O. 1927, ch. 233, sec. 342, subsec. 1, the claimants are entitled to compensation for the land taken without any deduction because of any advantage to the land not taken. What sum Mr. Page deducted because of such advantage does not appear, and the only conclusion to be drawn from his evidence is that in his opinion the land taken was worth more than \$4,000 an acre, but how much does not appear.

It may here be observed that land values in the town of Sandwich have greatly advanced during the last few years.

For the claimants, Joseph A. Marentette gave evidence to the following effect. He had been engaged for years in the real estate business in the town of Sandwich, and was familiar with the advancement that had taken place there within recent years. In 1929 his firm was instructed by Messrs. Thomas & Lane, of Detroit, to negotiate with the claimants for the purchase of their property and offered the Assumption College at Sandwich \$6,000 an acre for the whole property, some 44 acres, but the offer was refused because the College considered the property worth more.

The Rev. Father Kennedy, Superior of the College, corroborated Marentette. Asked why the College refused the offer of Thomas & Lane, he said: "We refused the offer because we decided that the land was worth more than \$6,000 an acre." The following are extracts from his evidence:—

"Q. Provided the price per acre had been satisfactory, tell me whether or not the other terms of the offer and the substance of the particulars binding the offer were satisfactory or otherwise? A. Yes. That was quite satisfactory . . . If the price had been right, we certainly would have accepted the offer."

From the cross-examination of Father Kennedy:—

"Q. That offer was on time, was it? A. So much down and so much in 5 years. Balance in 5 years.

"Mr. Sale. That is all."

According to the evidence, Thomas & Lane for years have been carrying on the real estate business in Detroit, and personally were largely interested in real estate in the vicinity of the land in question. A few months before they offered to purchase the College property, they had bought from the College 13 acres farther out on the Huron-road. Father Kennedy swore that the relationship of the College with them, with reference to that purchase, the

payments and terms, had been satisfactory, adding, "Very satisfactory."

There is no reason to doubt that the offer of Thomas & Lane of \$6,000 an acre for the College property was *bonâ fide*, and that they were experienced real estate men, familiar with values of lands in the district, and would have made good their offer if accepted.

Frank Donlan, in May, 1928, sold a block of 6 acres of land, being part of the said farm lot No. 63, situate on Huron-street about two miles away from the land in question, for \$37,000, or about \$6,000 an acre.

Clarence Moore owned a block of land, being also part of farm lot No. 63, lying along Huron-street, and containing 4 and 61/100 acres, in February, 1929, sold for \$35,000. On this property was a farm-house, together with certain other farm-buildings, also a peach-orchard of some 300 trees. The evidence, I think, shews that this property *quâ* farm was not worth \$35,000, that the best value procurable for it would be by its being subdivided into town lots. So subdivided, the buildings upon it would be of very little value. At most, the house might have been worth \$4,000 if some one owning land in the vicinity were prepared to buy it at that sum, and move it on to the neighbouring land. Otherwise it had only the value of wreckage property. Thus the price realized from the Moore property exceeded \$6,000 an acre.

Ulysses J. Reaume for 17 years had conducted a real estate business in Sandwich, both as agent and also as buyer and seller in his own behalf, and he knew well the College land, and also the Donlan property, and in his opinion, beyond any doubt, the College property was more valuable for subdivision purposes than was the Donlan property. He considered the 44 acres owned by the claimants as worth \$6,000 an acre.

Mr. Sale, acting as solicitor for the Town of Sandwich in the purchase of certain properties in the neighbourhood of the land in question, shewed that in 1926 the town purchased from one W. C. Webber 64 acres at \$2,933 an acre; in 1927, lot 3 on the west side of Huron-street, containing 1 and 1/6 acres, for \$4,628; and in November, 1928, 1 and 72/100 acres for \$3,752. The precise relationship of these three parcels to the property of the College does not appear, and those transactions do not assist in determining the value of the College property.

G. W. Grey, assessor for the Town of Sandwich, had lived almost all his life in Sandwich. In 1928 he assessed the College property at \$2,000 an acre, that being, in his opinion, from 50 to 60 per cent. of its value.

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W. J. Burns, who carried on a real estate business in Sandwich, studied jointly with Mr. Page in ascertaining the value of the College property, and he agreed entirely with Mr. Page—thus his evidence is open to the same objection as is Mr. Page's.

From the evidence it appears that the claimants could have sold their property to Thomas & Lane for \$6,000 an acre, but refused to do so because, in their opinion, the price was too low. The evidence of sales of properties in the neighbourhood, particulars of which are above set forth, shews that the claimants' property was worth, to the claimants, at least \$6,000 per acre, and I therefore think this appeal should be allowed, and that the compensation should be at that rate, making for the 2 and 856/1000ths acres, the sum of \$17,126. The claimants are entitled to the costs of this appeal.

MAGEE, J.A.:—The appellant Episcopal Corporation owns a block of 44 acres, having a frontage of two-thirds of a mile on the old established Huron Church Line-road and near the new International Bridge, the expected opening of which largely affected the value of land in the locality. Apparently in preparation for growth of population and traffic, the town corporation considered it advisable to widen the Huron Church Line-road, and has taken a strip 36 feet wide off the front of the adjoining land of the Episcopal Corporation for a distance of 3,456 feet, 2 inches, and amounting in all to 2.856 acres. For this the learned arbitrator has awarded as compensation the sum of \$11,424, being at the rate of \$4,000 per acre. No one should be in a better position than he to know of the growth of the group of municipalities on the Detroit river or to bring to bear a sounder judgment of value, and that in itself stands in the appellants' way in seeking to disturb his award. The reasons he has given shew how carefully he has considered the situation and the evidence before him. It is difficult to feel justified in differing from his conclusion that \$4,000 per acre was the fair value of the block of 44 acres. He does not ignore the fact that in January, 1929, about a month before expropriation, an apparently *bonâ fide* offer of \$6,000 per acre had been made for the block and had been rejected. The appellants point to this as conclusively shewing the amount awarded to be inadequate. That it is a strong circumstance of great weight is undoubted, but the fact of a single offer having perhaps unwisely been made, and its acceptance perhaps unwisely refused, cannot be said to fix conclusively the value. Had it been accepted and this parcel afterwards expropriated in the hands of the purchaser, he could not say that the fact of his having paid \$6,000 per acre

conclusively settled what he could realize or should receive. But in concluding, as the learned Judge has done, that \$4,000 per acre was the fair value of the block of 44 acres, it does not follow that the small portion expropriated should be valued at that rate. Such a price would only be given for purposes of subdivision. In subdividing such a block there is necessarily a loss of land for streets, and there is lapse of time in selling, during which interest and taxes accrue. If the loss of land be put even as low as one-eighth and the average time for sale of the whole at only a year, it is evident that the average immediate market value of the small parcels must be expected and considered to be more than \$4,000 per acre. In addition, it is evident that the road which is to be widened is already considered to be one having or expected to have traffic, and which needs widening. That usually means greater value than other parts of the block. It may be that the widening will increase the value of the appellants' land adjoining the widened street, but the compensation for the land taken cannot be reduced on that account. If the remaining land were injuriously affected such increase would have to be considered, but I do not think there is any such injury.

On the whole therefore on the evidence and considering the situation, I consider that the amount of \$6,000 per acre, which my Lord the Chief Justice considers should be allowed, is a proper amount, and that the award should therefore be correspondingly increased.

HODGINS, J.A.:—On the evidence given on the arbitration here it seems clear that the expropriation of the long strip 16 feet wide along the side of the appellants' property would damage the remaining block. It reduced its adaptability for subdivision by subtracting from the depth of many of the lots which could be laid out, or the number of lots into which with proper depths it could be divided. The fact, however, that the strip was to be laid out by the respondents as part of a wide highway undoubtedly advantaged the appellants and minimised, if it did not entirely absorb, this damage.

The learned arbitrator has allowed \$4,000 an acre for both the strip and the damage to the remaining property, and I am disposed to agree with him, in view of the sale pointed out by Mr. Sale in close proximity to this property. This is evidence within the principle laid down in *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee*, [1901] A.C. 175.

The higher valuation, \$6,000 per acre, is based upon a verbal offer, made antecedently to the expropriation by-law, of \$6,000

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per acre for the whole block. Perhaps this was really only an inquiry, but it was refused.

From the evidence it is not clear whether it was a firm and enforceable offer if accepted. It does not seem to have been in writing. I am satisfied that such a verbal offer if made should be more definitely inquired into before it can be taken as conclusive evidence of value. In the first place, an offer for the whole of an extensive block, containing a large number of acres, is not a proper standard by which to judge the value of a strip 16 feet wide along its front or side. It all depends on how it is to be used. It is not the market price for a long strip of shallow land but only for an undivided block. In the second place, the evidence may be perfectly honest, but these verbal offers, when translated into a written contract, often result in a smaller figure, or contain stipulations, qualifications, and conditions, or some feature which robs the original amount of the offer of its value as evidencing the exact amount of the sale-price. I do not think sufficient evidence of it has been given to enable the Court to treat it as a firm offer, or as equivalent to an actual sale at the price stated.

For these reasons and for that stated by Middleton, J.A., in *Re Scott and Town of Oshawa* (1922). 52 O.L.R. 504, I prefer to affirm the award and am against increasing the damages.

MIDDLETON and GRANT, J.J.A., agreed with MULOCK, C.J.O.

Appeal allowed (HODGINS, J.A., *dissenting*.)

[APPELLATE DIVISION.]

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COLLIS V. CAREW LUMBER CO. LTD.

Sale of Goods—Conditional Sale of Furnace—Installation in Dwelling House—Validity of Claim of Seller to Repossess—"For the Purpose of Resale"—"In the Ordinary Course of his Business"—Conditional Sales Act, secs. 2(3), (4), 8—"Building Material"—Fixtures.

The defendant company, having a lien upon two houses being erected by F., obtained a judgment for its claim, and afterwards, in satisfaction of the judgment, took from F. a quit-claim deed of the houses. Thereafter, the company agreed to sell the houses to the plaintiff. F., as the plaintiff knew, had been in financial trouble, and the plaintiff's purchase was carried out upon the footing that the company was to pay all outstanding claims against the property out of the purchase-money. A furnace had been purchased by F., upon a conditional sale agreement with the vendor, and placed in one of the houses. A balance of \$110 was due upon the furnace, but that was not known to the plaintiff nor to the company, nor did they make inquiry. About a month after the completion of

the sale of the houses, the vendor of the furnace demanded payment, and, upon payment being refused, proceeded to remove the furnace from the building. After it had been partly taken down, the plaintiff paid the amount claimed, and now sued the company for that amount. The furnace had been set up on the concrete floor in the cellar and was affixed to the realty only by the flues for hot and cold air and by the pipe conveying smoke to the chimney:—

Held, that the furnace was not delivered to a purchaser "for the purpose of resale by him" within the meaning of sec. 2, subsec. 3, of the Conditional Sales Act, R.S.O. 1927, ch. 165: it was to be placed by him in the house he was building, of which it would become an integral part: a sale of the house would not be the sale of a chattel.

2. F. put the furnace into the house he was building, but he did not sell it "in the ordinary course of his business," within the meaning of sec. 2, subsec. 4.

3. The furnace, having become a fixture, was not "building material" within the meaning of sec. 8 of the Act: the words "other than building material" were inserted in sec. 8 in order to make it clear that that section had no application to such cases as *Hall Manufacturing Co. v. Hazlitt* (1885), 11 A.R. 749.

Review of the decided cases.

4. The contention that, inasmuch as the price of the furnace included labour incidental to the installation and the price of lumber and other material used in the construction of air-ducts, the separate amount due upon the furnace could not be ascertained, and so there was no valid lien, could not prevail. *Re Canadian Camera and Optical Co.* (1901), 2 O.L.R. 677, followed.

5. The validity of the claim of the conditional vendor upon the furnace was established, and the plaintiff was entitled to succeed in the action.

AN appeal by the plaintiff from the judgment of the First Division Court of the County of Ontario (RUDDY, Jun.Co.C.J.), dismissing an action upon the covenants against encumbrances and for quiet enjoyment contained in a deed executed by the defendant company conveying land, with a house thereon, to the plaintiff.

A note of the reasons for judgment of RUDDY, Jun.Co.C.J., appears in 37 O.W.N. 413.

April 17. The appeal was heard by MULOCK, C.J.O., MAGEE, MIDDLETON, and GRANT, J.J.A.

A. C. McMaster, K.C., and *A. O. L. Burnese*, for the appellant. The County Court Judge was in error in holding that the furnace was delivered for resale under sec. 2, subsecs. 3 and 4, of the Conditional Sales Act, R.S.O. 1927, ch. 165. Frost did not sell the furnace as a chattel. Nor did he even sell the house in which the furnace was installed. He merely conveyed it to a judgment creditor. Frost was a speculative builder. He did not sell the furnace in the ordinary course of business. Section 8 of the Act refers to building material. An article such as a furnace was never intended to be covered by this section.

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Cecil G. Frost, for the defendant company, respondent. Frost was a speculative builder, and as such was engaged in the business of buying furnaces, installing them in houses which he sold. The furnace as part of the house was therefore sold in the ordinary course of business, and the respondent company bought in good faith: *International Business Machines Co. Ltd. v. Guelph Board of Education*, [1928] S.C.R. 200; *Dominion Lock Joint Pipe Co. Ltd. v. Township of York* (1929), 64 O.L.R. 365. In any event the furnace is part of the necessary and usual equipment of a house and therefore properly described as "building material."

May 12. MIDDLETON, J.A.:—Appeal by the plaintiff in an action in the First Division Court of the County of Ontario from the judgment of his Honour Judge Ruddy pronounced on the 18th January, 1930, dismissing the action with costs.

The Carew Lumber Company, the defendant, having a lien upon two houses being erected by one W. Frost, obtained a judgment for its claim, and afterwards, in satisfaction of this judgment, took a quit-claim deed of the houses from Frost.

Thereafter, on the 7th January, 1929, the company agreed to sell the houses to the plaintiff, and this transaction was carried out a few days later. Frost was known to the plaintiff to have been in financial trouble, and the purchase was carried out upon the footing that the defendant company was to pay all outstanding claims against the property out of the purchase-money. As put by the plaintiff's son, who conducted the transactions for her: "I said: 'Remember as these houses were under liens.' I said, 'Is the furnace paid and the plumbing and lumber and so on?' He said, 'When you buy this property everything will be paid and we will see that it is paid.'"

The furnace had been purchased by Frost from the Howard Furnace Company upon a conditional sale agreement bearing date the 27th January, 1928, upon which there was a balance of \$110 due, a fact not known at the time to either of the contracting parties. They, however, made no inquiry. About a month after the completion of the sale, the furnace company demanded payment, and, upon this being refused, proceeded to remove the furnace from the building. After the furnace was partly taken down, the plaintiff paid the amount claimed, and now sues for the sum paid.

The furnace was set upon the concrete floor in the cellar, and was only affixed to the realty by the flues for hot and cold air, which were connected with it, and by the pipe conveying smoke to the chimney.

Counsel for both parties have throughout contended that liability depends solely upon the question argued: the validity of the claim of the vendor upon the furnace. No other question has been argued, and so I discuss this alone. See *Blay v. Pollard*, [1930] W.N. 92 (C.A.)

The learned County Court Judge has found the claim invalid and bases his decision upon two distinct grounds:—

1. The furnace was delivered to Frost for the purpose of resale by him in the course of business and was resold by him in the ordinary course of his business, and so the property passed, notwithstanding that the provisions of the Act had been complied with. See the Conditional Sales Act, R.S.O. 1927, ch. 165, sec. 2. subsecs. 3 and 4.*

2. The furnace is building material within sec. 8, and so, on being affixed to the realty, the conditional vendor lost his property in it.

A third point was also discussed with respect to the amount of the claim. It is contended that, inasmuch as the price included labour incidental to the installation and the price of lumber and other material used in the installing and construction of air-ducts, the separate amount due upon the furnace cannot be ascertained, and so there is no valid lien. This is completely answered by the decision in *Re Canadian Camera and Optical Co.* (1901), 2 O.L.R. 677, and need not be further discussed.

Dealing with the first question, it will be seen that subsecs. 3 and 4 require two conditions to exist before the property shall be deemed to have passed contrary to the terms of the agreement upon which it was sold. First, it must be delivered to a purchaser "for the purpose of resale by him." This is aimed at the kind of transaction by which a machine, e.g., a sewing machine or radio, is placed in the possession of a merchant who is expected to sell it as a chattel in the course of his business. This furnace was not delivered to Frost for any such purpose. It was to be placed by him in the house he was building and of which it would become an integral part. This house he might sell, but it would not then be the sale of a chattel as contemplated by the Act.

In the second place, the property in the chattel will not pass unless the goods have been sold by the purchaser "in the ordinary

* (3) Where the delivery is made to any person for the purpose of resale by him in the course of business such provision shall also, as against his creditors, be invalid and he shall be deemed the owner of the goods unless the provisions of this Act have been complied with.

(4) Where such person resells the goods in the ordinary course of his business the property in and ownership of such goods shall pass to the purchaser notwithstanding that the provisions of this Act have been complied with.

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course of his business." Frost, in truth, put this furnace in the house he was building, but he did not sell it in the ordinary course of his business. He gave a quit-claim deed to a lienor who had an unsatisfied judgment against him for material supplied. In no sense can this be regarded as a sale by Frost in the ordinary course of his business.

When a chattel has become a fixture, the section of the Act governing the rights of the parties is sec. 8,* and, assuming in other respects a valid conditional sale, the purchaser of the land is given the right to retain the fixture upon payment of the amount due. Otherwise, upon the occurrence of default, the seller may remove the fixture as fully and freely as if it had never been affixed to the land.

This statutory enactment, as has been more than once pointed out, makes inapplicable here many English cases, of which *Hobson v. Gorringe*, [1897] 1 Ch. 182, and *Reynolds v. Ashby & Son*, [1904] A.C. 466, are outstanding examples. The law laid down in the Ontario cases, *Hall Manufacturing Co. v. Hazlitt* (1885), 11 A.R. 749, and *Polson v. Degeer* (1886), 12 O.R. 275, has thus received legislative sanction and prevails over the English cases where there is no corresponding legislation. See *Liquid Carbonic Co. Ltd. v. Rountree* (1923), 54 O.L.R. 75.

The second ground of decision is based upon a curious misunderstanding of the reason for the insertion of the words "other than building material" in sec. 8. The word "goods" is given a very wide significance in the Conditional Sales Act, and might well be taken to cover material used in the erection of a building, e.g., lumber and bricks. In fact it has been so argued. To avoid this result and make it plain that this was never intended, these words were added.

In *Hall Manufacturing Co. v. Hazlitt*, *supra*, it was made plain that the whole discussion centred upon property which came within the designation of "a fixture" and was a thing capable of removal without serious injuries to the realty. Burton, J.A., saying (p. 750): "If, for instance, a man should convert a quantity of bricks and erect them into a house, they would have lost their legal identity as chattels so as to be incapable of recaption by the original owner;" that which is "built into and becomes part

* 8. Where the goods other than building material have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other encumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them.

of the building would then fall within the rule '*quicquid plantatur solo, solo cedit.*'"

This same distinction is pointed out in *Gough v. Wood & Co.*, [1894] 1 Q.B. 713, where Lord Justice Lindley, at p. 719, quotes from Bac. Abr.: "If a piece of timber which was illegally taken has been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken, the nature of the timber being changed; for by annexing it to the freehold it is become real property." He adds: "If I employ a builder to build me a house and he does so with bricks which are not his, I apprehend they become mine and their former owner cannot recover them or their value from me."

It was to make it plain that sec. 8 had no application to such cases that the change made in the statute was recommended by the Statute Revision Commission.

In the Quebec case *Labbé v. Francis* (1891), 7 Montreal L.R. (S.C.) 305, Mr. Justice Wurtele determined that in a contract for sale of building materials to be recovered from a house being demolished, fixtures, including furnaces, steam-pipes, radiators, etc., were not included. It is hard to conceive how any one could regard a completed machine, such as a furnace installed in a house, as building material. It may not always be easy to draw the line, but a furnace seems very clearly outside this description.

This review of the decided cases makes it plain that we are not now deciding anything in conflict with *International Business Machines Co. Ltd. v. Guelph Board of Education* (1927), 61 O.L.R. 85, [1928] S.C.R. 200, for the finding there was that the clock in question was sold to a dealer for the purpose of resale and was in fact resold.

Nor are we deciding anything in conflict with *Dominion Lock Joint Pipe Co. Ltd. v. Township of York*, 64 O.L.R. 365, for the tiles there sold were not capable of being regarded as fixtures. On their being placed in position, they clearly became part of the land just as much as the bricks in a building or the nails in a roof.

The appeal should be allowed with costs here and below, including the same counsel-fee as that allowed in the Court below to the defendant.

MULOCK, C.J.O.:—I agree.

MAGEE, J.A.:—I agree in the conclusion arrived at by my brother MIDDLETON that the appeal should be allowed.

GRANT, J.A.:—I agree.

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Appeal allowed.

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May 23.

Mines and Mining—Records of Stakings—Cancellation—Evidence—Reversal of Decision of Mining Court — Substantial Compliance with Requirements of Mining Act of Ontario — Restoration of Records.

Substantial compliance as nearly as circumstances will reasonably permit with the requirements of the Mining Act of Ontario as to staking out of mining claims is sufficient: R.S.O. 1914, ch. 32, sec. 58.

Every reasonable intendment ought to be made to uphold the validity of a claim where there has been actual discovery and an honest attempt to comply with the directions of the Legislature in staking and describing the location of the discovery.

Clark v. Dockstader (1905), 36 Can. S.C.R. 622, followed.

Records of C's stakings of the 23rd March, 1926, of 9 mining claims in Red Lake Mining Division, in the District of Patricia, were cancelled by order of the Judge of the Mining Court of Ontario; but it was *held*, on appeal to the Appellate Division of the Supreme Court of Ontario, that, upon the evidence, C's stakings were in substantial conformity with the requirements of the above Act and amendments, and the records were restored.

The provisions of secs. 8, 9, 54, 58, 59, 63, 89, and 113 of that Act and the amendments made in 1922 by 12 & 13 Geo. V. ch. 22, considered. *Re Cole and Knowles* (1927), 60 O.L.R. 638, referred to.

Formal judgments should be issued in the Mining Court in cases of importance.

APPEAL by J. Y. Cole the younger from the judgment of the Mining Court of Ontario (GODSON, J.) cancelling the recording of certain claims in the Red Lake Mining Division, and appeal by J. Y. Cole the elder from the finding of the Court that the claims were restaked at a time when the lands were not open for staking.

December 6. The appeals were heard together by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, J.J.A.

A. G. Slaght, K.C., for the appellants, argued that the staking by Cole junior of the 9 claims was a substantial compliance with the Mining Act of Ontario, 17 Geo. V. ch. 15, secs. 59 and 61, and so the order cancelling Cole junior's stakings should be rescinded. Reference to *Re Cole and Knowles* (1927), 60 O.L.R. 638; *Clark v. Dockstader* (1905), 36 Can. S.C.R. 622.

E. E. Wallace, K.C., for Dupont and others, respondents, contended that there had not been substantial compliance with the Act. Some posts were missing, some were not properly marked, and there were instances of improper blazing. The second Dupont staking was good.

May 23. The judgment of the Court was read by LATCHFORD, C.J.:—These appeals are by the Coles—father and son—from the

judgment of Mr. Justice Godson, Judge of the Mining Court of Ontario, pronounced on the 18th July, 1929, in regard to 9 mining claims, K.R.L. 1628-1636, at Pipestone Bay, in Red Lake Mining Division, in the District of Patricia.

The appeals were argued together on the 6th December, 1929, but leave then given to both parties to file further material was not fully complied with until recently.

On the 16th January, 1928, the matter came before the learned Judge on disputes under sec. 66 of the Mining Act of 1927, 17 Geo. V. ch. 15, now sec. 64 of R.S.O. 1927, ch. 45, filed by Eustache Dupont with the Mining Recorder of Red Lake Mining Division, on the 9th July, 1929. Dupont sought to have the records of the younger Cole's stakings of the 23rd March, 1926, cancelled, and his own of the 17th May, 1926, of 7 claims, covering nearly the same area, validated. Judgment was rendered approving the conduct of the Recorder in cancelling Cole's records and granting Dupont's.

Cole senior restaked the claims while the matter was still pending, and filed applications for record on the 16th April, 1927. Earlier, on the 29th March, 1927, he had filed disputes of the stakings and records of Dupont.

It appeared during the trial that one Grafton Smith was the assignee of Dupont and others who promoted Dupont's activities on and in regard to the claims.

No formal judgment was issued. It appears from the statements of the counsel concerned in the appeal that it is not the practice of the Mining Court to issue formal judgments, but that the reasons of the Judge are regarded as the judgment of the Court. If such is the fact, the practice should not be continued in cases of importance.

At the end of the reasons, certain conclusions of the learned Judge are thus stated:—

"Grafton Smith should be added as a disputant, and I so order.

"It is not a case where costs should be allowed. I order that mining claims K.R.L. 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, and 1636, situate in Red Lake Mining Division, be and the same are hereby declared cancelled.

"I direct that this decision, together with all exhibits and papers filed upon the trial, be filed in the office of the Mining Recorder of the Red Lake Mining Division at Goldpines."

The particular mining claims mentioned are only those recorded by Cole junior. It was, however, intended that the claims bear-

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ing other numbers as staked by Dupont and the original numbers as staked later by Cole senior should be affected by the judgment, the total area being in all cases approximately identical.

On p. 11 of the "reasons" (appeal-book p. 17) appears this material finding:—

"I find that Dupont did not comply with the Act, and his stakings must be declared invalid.

This should be incorporated in a formal judgment.

Later the learned Judge says:—

"I have as a matter of general policy, and for the purpose of maintaining public confidence, which is necessary and desirable, in the integrity of the officials of the Department, and for other irregularities I have referred to, held that Dupont cannot under the circumstances maintain the stakings of March, April, and May."

All Dupont's stakings or restakings of the Cole claims are thus set aside, and entries of them of record in the books of the Recorder are as a matter of course cancelled. The judgment is not appealed against by Grafton Smith or Dupont.

The stakings of Cole senior were also declared illegal. When they were made, judgment had not been rendered by this Court on the appeal from the decision of the Mining Judge in regard to the same area (reported, *sub nom. Re Cole and Knowles* (1927), 60 O.L.R. 638), to which I shall later advert. The purpose of the elder Cole in restaking was merely to give him a *locus standi* to file disputes under sec. 66 of the Act of 1927, if the judgment of the Mining Judge should be sustained by this Court. As that judgment was reversed, the stakings and disputes of the elder Cole eliminate themselves and need not be considered. Both the Coles represent the same proprietary interest, which at the time the present case was before the Mining Judge had been acquired by the younger Cole. According to the statement of Mr. Slaght, who represented the Coles, both are content if the appeal of Cole junior is allowed. That appeal is based on the following grounds:—

"1. The judgment is against law and evidence and the weight of evidence.

"2. The learned Judge erred in ordering that mining claims K.R.L. 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, and 1636, situate in the Red Lake Mining Division, and the property of this appellant, be cancelled.

"3. This appellant was the first and original staker of the said mining claims and the first to record the same, and the title

of this appellant thereto should have been confirmed instead of cancelled.”

The effect of the judgment is that none of the stakings—Cole junior's, Dupont's of 1926, Cole senior's of 1927, and Dupont's of 1927—was validly made. Accordingly, it would have followed as a matter of course that, had appeals not been entered by the Coles, the area covered by all the stakings would have been re-opened to prospectors more than 3 years after it had been first staked.

The facts relating to those stakings and the conduct of the Recorder with reference to them are many and complicated. Even in their more important aspects, they cannot be stated except at considerable length.

It appears that not long after the discovery of gold in the vicinity of Red Lake, and the establishment there at a place called Goldpines of the office of a Recorder, young Cole was instructed by certain residents of Toronto to proceed into the district and stake claims on their behalf. Cole himself, and two at least of his employers, held miners' licences. He called on the Recorder early in March, 1926, and procured a copy of the official map, shewing, as required by sec. 59 of the Mining Act of Ontario, as enacted by sec. 14 of the Mining Amendment Act of 1922, in force at the time, all the claims recorded in the office. While the snow was still deep, Cole and three other men with a dog-team went west 20 or 25 miles into unsurveyed virgin territory, about 3 miles beyond the nearest recorded claims plotted on the map, K. 1518 and K. 1519. His evidence is that on a peninsula on Pipestone Bay, about half a square mile in area, he discovered an outcrop of gold-bearing rock. In his own name and the names of two of his employers, he staked, as he had the right to stake, 9 forty-acre claims. He was, as the learned Judge states, a prospector of long experience, who knew the requirements of the Mining Act in regard to staking. His evidence is that he complied with the Act, which makes necessary not absolute, but only substantial, conformity with its requirements as to staking. Where a high cliff rendered the placing of corner-posts impracticable (Mining Act, R.S.O. 1914, ch. 32, sec. 54, subsecs. 2-4), Cole put up witness-posts. The corner-posts on the shores of the peninsula and on the west side of the 9 claims were, he deposed, all duly erected and inscribed, as were all the inner corner-posts with the exception mentioned. He said he blazed all the lines in the manner required by the Act. There was snow on the frozen ground, and Schnob, a prospector called on behalf of Dupont, who admitted that he “certainly wanted

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Dupont to beat Cole," said on cross-examination (p. 150) that "it happens," "it is a fact," that, "when the spring break-up comes, posts often go down a hill."

"Q. And there is a certain amount of down-hill to the water?"

A. There is a hill on all these claims down to the water."

Cole returned to Goldpines, and on the 26th March, 1926, applied under sec. 59 of the Mining Act, R.S.O. 1914, ch. 32, as enacted by sec. 14 of the amending Act of 1922, 12 & 13 Geo. V. ch. 22, for record of the 9 claims, and they were duly recorded. The description, sketch, and information furnished were amply sufficient to "enable the Recorder to indicate" (as was his duty) "the claim (s) on his office map:" sec. 59 (1). The Recorder does not deny that he discharged his duty in that respect. The map is to be publicly displayed in the Recorder's office: Mining Act, R.S.O. 1914, ch. 32, sec. 8, as enacted by sec. 3 of the amending Act of 1922. The obvious purpose of the exhibition is to enable prospectors and others to know, in advance of any enterprise they may contemplate undertaking, what claims have been recorded, the precise locality where such claims are situated, and what areas are open for staking. Every document connected with Cole's stakings on Pipestone Bay was also open to inspection: R.S.O. 1914, ch. 32, sec. 9.

Bearing samples of ore and rough memoranda of the location of his discovery, Cole left Goldpines for the railway by plane on the 3rd April. In the meantime, on the 31st March and 1st April, he had been back in the vicinity of his discovery and had staked other claims, not, however, in dispute in the case before the trial Judge, but occupying much of his attention.

Reaching Toronto in due course, Cole reported his discovery to his employers. An analysis of his samples proved them to be of economic importance. The parties spoke freely of the success of their venture, and at least one newspaper here published an account of the discovery. The disclosure would naturally attract the attention of prospectors and speculators to the find. Just when Grafton Smith and his associates in Massachusetts became interested does not appear; but about the middle of April Dupont and other men in his or their employ appeared at Goldpines. They held or obtained from the Recorder miners' licences for two of the party and for three or four of their Massachusetts employers. Omitting No. 581, as to the holder of which there is no evidence—it may have been issued to Grafton Smith—the licences numbered P. 577 to P. 582. The letter "P" indicated the office of issue. The initial and the sequence of the serial numbers shew that the

six licences were issued from the same office at the same time. Their cost was \$60. Other expenses of the expedition would be a much greater sum. The price of a blue print copy of the official map, similar to that furnished to Cole, was 50 cents: yet Dupont swore (p. 156, l. 26) that, although "we were looking for open ground, we had no blue print." If he had not, he was in my opinion the first prospector who ever led a party of six to look for open ground in a remote district which he had not previously visited, without providing himself with a map, or ascertaining from the official map of the locality in the Recorder's office what ground was open and what had been closed by recorded stakings. Dupont testified that when he first examined the map in the Recorder's office, a date not fixed, but prior to the 23rd April, the Cole claims were not plotted upon it. Either Dupont is mistaken or the Recorder was remiss in his duty. At the time the discovery of gold by Cole on his recorded claims had been known for weeks.

On the 23rd or 24th April Dupont appeared upon the Cole claims. He had previously been staking in the vicinity. He deposed (p. 156), "We staked on the north side (of the Cole stakings) 7 claims and on the east side 8 claims."

Although there was much open ground in the vicinity, Dupont's men, under his direction, between the 23rd and the 29th April, entered upon the peninsula where it was reported Cole had found gold, and restaked all but one of the 9 Cole claims, dividing what they restaked into 7 claims. That the whole area was not covered is probably accounted for by the fact that, acting for but 6 licensees, they could stake only 18 claims, and, having already staked 11 claims elsewhere, they could stake only 7 more. The stakes, according to Dupont, were dated the 27th, 28th, or 29th April. Owing to the spring "break-up" his party was delayed in returning, and, as the time for recording under sec. 59 was growing short, Dupont, before going out to Goldpines on the 12th May, changed the staking dates to the 10th May. That, he at first swore, was the last and only change of date he made on the stakes of any of the 7 claims. Later he admitted that, on the suggestion of the Recorder himself, he changed the date on his stakes a second time.

On reaching Goldpines on the 12th May, Dupont applied to have his 7 stakings on the peninsula recorded, notwithstanding the existing record made of the Cole stakings over the same ground 6 weeks previously. In other words, he disputed Cole's records.

The procedure regarding disputes is set forth in sec. 63 of the Mining Act in force at the time, R.S.O. 1914, ch. 32. A dis-

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pute is to be in a prescribed form, No. 8 of the schedule to the Act, and is to be verified by affidavit (form 9) and a fee of \$10 per claim paid for recording a dispute: schedule of fees under sec. 190. Subsection 2 of sec. 63 further provides that "a copy of the dispute and affidavit shall be left by the disputant with the Recorder who shall not later than the next day after the filing of the dispute transmit such copy by registered post to the recorded holder of the mining claim affected thereby." A dispute shall not be received unless it contains or has endorsed upon it the address for service of the disputant: subsec. 3. These and other provisions of sec. 63 indicate with what care recorded interests were intended to be protected.

Mr. Slaght, referring to sec. 63, asked the Recorder:—

"Q. He (Dupont) didn't file any affidavit at all, did he? A. No.

"Q. And pay to the Recorder the fee of \$20 (\$10)—he did not pay any fee? A. No.

"Q. And file a certificate stating that the Recorder was satisfied—you didn't see such a certificate? A. No."

The Recorder had informed Dupont of the proper procedure.

"Q. Was it not correct that you pointed out to Dupont that he had a right to file a dispute against these properties? A. Yes.

"Q. And Dupont decided he would not file a dispute? A. Yes. He said he was not staking for himself but for somebody else."

Another reason given for not following the usual procedure is that the Recorder was out of forms.

Section 63 was wholly disregarded by both Dupont and the Recorder, and the latter was prevailed upon to take, without notice to Cole, whose address he had, an exceptional course open to him under sec. 89 of the Act of 1914. He proceeded personally to inspect the peninsula on Saturday the 15th May. Asked if he made the long, and, as will appear, the hazardous, voyage at the instigation of Dupont, he answered, "Not altogether."

"Q. Well in part? A. Yes."

With two companions the Recorder left his office for Pipestone Bay on the morning of the 15th in a boat propelled by an outboard motor. In about four hours he reached the Dupont camp, the only inhabited camp, he deposed, within 15 miles of the Cole claims, and was accompanied thither by Dupont and another of the Smith prospectors. The inspection which he then made, largely from the boat, was, upon his own evidence, of the most partial and perfunctory character. If Dupont is to be credited, the stak-

ing and blazes on many of the claims were not looked at. Yet the Recorder told Dupont that he was cancelling all Cole's stakings. He did more. Expecting that he would be able to return to his office on the same day and then enter upon his books as of the 15th May the cancellation of the Cole records, he advised Dupont to remain on the ground, and on Monday to change the date of his restakings from the 10th to the 17th. Had the 10th been allowed to remain the date of the stakings, they could not be recorded in the face of the subsisting records granted to Cole. If, however, Cole's records were cancelled on the 15th, as Dupont was assured had been or would be done, the 9 Cole claims would be automatically thrown open for immediate staking.

Mr. Slaght was naturally curious regarding the consideration shewn to Dupont or his employer, and inquired of the Recorder:—

“Q. Have you ever gone and cancelled anybody else's claim behind his back without notice? A. No, sir.

“Q. This is the only instance in that camp? A. Yes.”

When this evidence was given, as a comparison of the map exhibit 16 with the map furnished to the younger Cole proves, several hundred claims had been recorded south and east of the peninsula on Pipestone Bay. Cole and those who employed him were grossly prejudiced by not having notice of the inspection. On the other hand, exceptional favour was manifested for the prospectors employed by Smith, who had been on the peninsula for weeks and had ample opportunity to obliterate stake markings and remove or cut down stakes. That Dupont is a man who would not hesitate to take such measures is apparent from his evidence.

The Recorder left Dupont's camp on the afternoon of the 15th, but his boat was wrecked on the way out, and he did not reach Goldpines until Sunday morning. He was asked (p. 28):—

“Q. You went away leaving Dupont there, knowing he was going to stake these claims on Monday morning the 17th? A. Yes.

“Q. Of course if any other prospector staked (attempted to stake) there, he had no chance against Dupont? A. No.

“Q. So that, rightly or wrongly, what you were doing was to give Dupont an opportunity to get these claims? A. Well, he had spent a lot of time staking them.

“Mr. Slaght: I want to know if I am right? A. Yes.”

Nothing official was done by the Recorder on Sunday the 16th, but on Monday he made an entry upon the record of each of the Cole claims as follows:—

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"May 15, 1926. Cancelled, stakings and applications irregular.
H. E. Holland, M.R."

There was no irregularity in the applications. They appear to be in strict conformity with the Act.

Section 91 (1) requires that the date of entry shall be stated on the record of the claim. The actual date of the entry was the 17th May, and the date "May 15" was falsely stated. His obvious purpose in so falsifying the records was to give the date of cancellation an apparent priority to the date, the 17th, which he had advised Dupont to substitute on the Monday for the "10th," with which he had last dated his stakes.

Dupont came out to Goldpines with one or more of his men on the 21st May, and on affidavits that the date of staking was the 17th May, 1926, obtained records for the 7 claims on the peninsula. Notice of the cancellation, addressed to the Deputy Minister of Mines, though written on the 17th, was also dated the 15th.

When the cancellation was approved by Judge Godson and Cole appealed to this Court in *Re Cole and Knowles*, the main question to be determined was, whether the learned Judge was right in ratifying the action of the Recorder in the circumstances which I have outlined. A minor issue was, whether evidence tendered of a friendly relation alleged to have existed between the Recorder and Dupont had been properly rejected. Both these phases of the case are dealt with in the opinion of the Court, written by my brother Riddell, in *Re Cole and Knowles*, at pp. 641 and 642, and need not be repeated. This, however, must be said, that the learned Judge's concern for the Recorder, which is there a subject of adverse comment, is again manifested in the present case. I cannot but regard this attitude as in large measure influencing—perhaps unconsciously—his decision approving the cancelling of the claims staked by young Cole in March, 1926. The same tendency is observable in the cross-examination to which Cole was subjected in the present case by Mr. Wallace on collateral matters and in questions put by the Judge himself.

Mr. Wallace asked Cole:—

"Q. Have you ever been arrested? A. Yes, your Honour, I have been arrested.

"Q. How many times? A. I have been arrested once in all my life.

"Q. For what? A. For protecting my property from a gang of pirates in Red Lake and protecting my life from being killed

by the men whom you represent and by the vicious act of the Recorder, who was working with them."

Mr. Slaght interposed: "And acquitted weren't you? A. I was acquitted."

Mr. Slaght: "To the knowledge of counsel asking the question. It should be stricken from the record; it is most objectionable."

"Mr. Wallace: Is it a fact that you were acquitted? A. I was not only acquitted, but the Mining Recorder prevented an appeal from his Court, and I charged him with corrupt practice in that, and your clients as being the cause."

"Judge Godson: Just compose yourself. A. You don't know what I went through in that country, your Honour."

Mr. Slaght again protested: then—

"Judge Godson: What was he arrested for? He says, protecting his property. With what was he charged? A. Charged with assault by me at Hudson's."

"Q. Did you appear before the magistrate at Red Lake; is that the fact? A. The facts are there."

"Q. Don't give me the facts. You were charged with assault? A. Yes."

"Mr. Slaght: Before Holland, the same Recorder who had thrown his claims out."

"Judge Godson: You assaulted whom? A. Hodgson. He said my father and I assaulted Hodgson."

"Q. And what was his finding as a magistrate? A. I countercharged."

"Q. What was his finding as a magistrate? A. There were two cases, I have to explain."

The Judge was not interested in Cole's charge against Smith's man and did not wish to hear the proffered explanation. He continued:—

"What was his finding in your case? A. They took the two together. I charged Hodgson with an attempt to kill me, which is the fact, and the Recorder knew it, and he didn't come in and offer any support to me, but they got up a suit which is all a falsehood to get me in gaol, so I cannot be a witness at my own trial."

"Q. Oh, that is all nonsense. You don't expect me to believe that. Give me the facts."

"A. The facts are these: They brought me before the Mining Recorder."

"Q. And how did he dispose of the case? A. He said we were on suspended sentence for two or three months, and I told

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him we were going to appeal the case, and he struck out the suspended sentence.

"Q. Who is 'we'? Your father and you? A. Yes; and Holland struck out the suspended sentence. He said, 'If I believed the testimony against you, I would send you down for 3 or 5 years,' and he didn't hear all of our witnesses. We had 3 or 4 witnesses in Court.

"Mr. Slaght: And he struck out all the evidence against my client, so that is the thing from beginning to end. It never should have been put into this case by counsel. Your Lordship knows the rule. You cannot ask a man if he has been arrested. You can ask him if he has been convicted.

"Judge Godson: That is what I was asking."

A conviction was not what the Judge had been asking about, but a "finding." What appeared was that after a finding had been arrived at without hearing several witnesses for the defence, and the magistrate had announced that he would suspend the imposition of sentence for a few months, a protest was made by a number of men. The Recorder-Magistrate struck out his finding, and no conviction was made.

When evidence of this happy ending was given, the Judge said:—

"Mr. Cole, if you had a complaint like that, why didn't you come to the Attorney-General or the Minister of Mines with it? A. I am trying to tell your Lordship.

"Q. Well, that does not impress me; I don't like men who have fights up there. A. I am not a fighter.

"Q. Well, you say you protected yourself. A. Yes."

The equally irrelevant question of Cole's possession of a revolver was then brought up. Mr. Wallace asked:—

"Q. When did you get a permit to carry a revolver?

"Judge Godson: He is not an unlawful law abider.

"Witness: Shall I answer the question? It is the 19th July, 1927, after I was assaulted by Hodgson and he attempted to kill me

"Mr. Wallace: "Had you carried a revolver previous to that? A. No.

"Judge Godson: I would not carry one at all, Mr. Cole. A. Well, if there are people travelling your property with guns and rifles, what would you do? Be shot in the back?

"The Judge: I have been in this position since 1911, and it is the first time I have heard of a person being in danger if he was

an honest prospector and was honestly prospecting and staking claims."

Additional instances of a similar character appear in observations made by the learned Judge during his admission—despite repeated objections by Mr. Slaght—of wholly irrelevant evidence as to the staking by young Cole on the 1st April of 6 other claims not in question in this case.

The Recorder was thought "not to have used discretion in doing what he did, but felt that he was within his rights under the section under which he acted. The proper course was to have Dupont dispute." With this slight aspersion, the Recorder's conduct was overlooked, and that Dupont was "without instructions" was adopted as the reason why the obviously proper course was not followed.

In finding that the records of the 9 claims of Cole junior should be cancelled, the learned Judge seems to have placed no reliance whatever on the evidence given by Dupont and the Recorder of what they found or said they found on the peninsula in May, 1926.

After referring to his judgment in *Re Cole and Knowles*, and quoting extensively from it, the Mining Judge said that in the earlier case he was not influenced by the inspection of the Recorder nor by the evidence of the then respondents, but acted largely on the evidence and demeanour of Cole himself.

In regard to the present case he said:—

"Cole shewed full familiarity with the requirements of the Mining Act, and I could see that, when answering questions, he could immediately visualise what the Act required, and his answers met the requirements. Unfortunately, I feel I cannot rely upon his evidence. *He is too loquacious and at times evasive.* I am unable on the evidence to find that he staked *any of the 9 claims* in a substantial way. I have no hesitation in again finding that Cole did not stake the claims in question substantially or within the requirements of the Mining Act. It was an attempt, and inefficient at that."

On the other hand, the evidence of one Salton, a mining engineer, engaged for the benefit of Smith, is accepted, as (to quote the learned Judge) "he impressed me with his conciseness and fairness." Salton's evidence relates not so much to the stakes put up by Cole in 1926 as to conditions which he says he found existing in 1927, a full year later, when a surveyor employed by the Coles was running lines, and Dupont and others in the employment of Smith had been again on the property and were actually

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restaking it under Salton and another engineer, Packard. Any pencil markings on the stakes—and all the markings were in pencil—would then have become obliterated by natural agencies, and blazes 14 months old hard to find, all this apart from the mischief that claim-jumpers might be disposed to do. Salton said that when he was on the ground, in August of 1927, he found on some of the old posts “obliterated writing.” Packard’s evidence is to the same effect. A splint is in evidence as an exhibit, which shews that it had been cut from a staking post or stump. The location of stakes and blazes a year after they were placed or cut is, upon the evidence, a matter of great difficulty apart from weather obliteration. Some of the stakes placed by Cole in March, 1926, could have been displaced by flood, as Schenk admitted, or defaced by one of the many employees of Smith who had entered upon the disputed territory. Great numbers, however, of the original Cole stakes remained even in 1927. They are shewn in the photographs taken by Cole about the end of June in that year, in evidence as exhibit 18, and present sometimes, from more than one point, the aspect of the posts at the angles of each of the 9 claims or on the nearest shore where claims project into the lake. The photographs were not impugned in any way by Mr. Wallace. Yet they were considered by the trial Judge to be “illusory as evidence.” He added:—

“It is to be remembered that these photographs were taken the following year and at a time when Cole and his father were on the ground for some time, and during the time survey was being made, and it gives the impression of manufactured evidence.”

How the photographs could be regarded as illusory, or as manufactured in the sense in which these terms are employed, passes my understanding.

To bring this disagreeable appeal to a close, the only claims on which Cole, upon the evidence, did not place posts at the adjoining corners, are 1629, 1630, 1632, and 1633. A high bluff lay to the north, and on the top of a hill near its base Cole put in and inscribed 4 posts. He had a witness-post 20 chains to the east and marked thus: “W.P.”

After citing from Cole’s evidence at the trial in *Re Cole and Knowles*—evidence by the way not put in on the new trial—that Cole said, “I put in every stake on the claims with the exception of four posts upon the top of the Porphyry Hill, which it was impossible to get up. Even though it had been possible I could not do it because, as I said, Scott (one of his men) had to go,” his Honour proceeded:—

"This admission at once created an invalidity with respect to 4 claims where their angles met . . . This was, as Cole stated, on account of the inaccessibility of that particular spot," and "that Scott was waiting to take Cole out, and was impatient on account of the break-up, and was pressing Cole to leave the ground.

"When Cole gave his evidence on the trial now before me, he had a different story to tell with regard to the omission above quoted and his evidence is"—

Mr. Slaght (interrupting and referring to exhibit 18):—

"Q. Then on p. 4, at what point is that? A. This includes the 4 posts at the place where No. 3 would be on K.R.L. 1630; there are the 4 posts.

"Q. That is what the ground is like at that point, is it? Where those posts are? A. They are all staked on top of the hill.

"Q. That is where the posts are? So there are 4 there? A. Yes.

"Q. For what claims are they? A. 1630, 1633, 1632, 1629." The learned Judge commenting on this said:—

"It is to be observed that he was astute enough to see that his admission on the former trial was fatal to 4 claims and he has cured it by finding another hill. I cannot accept second version."

The second version is not in fact a change from the evidence quoted from the former trial, though Mr. Wallace sought to make it appear so. He asked:—

"Am I putting it fairly when I say the particulars you gave as to the stakings in your evidence in 1927 you do not want to change to-day? A. I am making additions to that. I don't understand what you mean, sir.

"Judge Godson: Q. Are the additions you are making to-day, whatever they may be, necessary in order to complete the staking done in March, 1926, in order to make it comply with the Mining Act? A. Well, I don't know, your Honour.

"Q. Is that your intention? A. I am not trying to make anything comply with the Mining Act. I am merely giving what I know to be true. That is a question of law."

The addition or change was simply that in his earlier evidence he spoke of only the high bluff where it was impracticable to place the stakes, and did not mention the hill-top below it, on which he did place them.

Section 54(2) of the Mining Act, R.S.O. 1914, ch. 32, provides for the very condition with which Cole was faced:—

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"(2) Where at a corner of the claim the nature or conformation of the ground renders the planting or erecting of a post impracticable, such corner may be indicated by planting or erecting at the nearest practicable point a witness-post which shall bear the same marking as that prescribed for the corner-post at that corner together with the letter 'W.P.' and an indication of the direction and distance of the site of the true corner from the witness-post."

Staking is a necessary preliminary to record, and to the survey under sec. 113 which must precede a patent.

Absolute conformity is not required. Section 58 enacts as follows:—

"Substantial compliance *as nearly as circumstances will reasonably permit* with the requirements of this Act as to staking out of mining claims shall be sufficient."

In *Dockstader v. Clark* (1904), 11 B.C.R. 37, 43, Hunter, C.J., said of an enactment of the Province of British Columbia: "I think that the course of the legislation as thus developed shews that the Legislature was fully cognizant of the difficulties which surround the proper and accurate staking of a claim in rugged and densely wooded districts, where indeed mineral in place is mostly found, and intended to make every allowance for it."

A similar intention is manifested by sec. 58.

In the Supreme Court of Canada, *sub nom. Clark v. Dockstader*, 36 Can. S.C.R. 622, the judgment of the Supreme Court of British Columbia was upheld. I quote from the judgment of Maclellan, J., at p. 637:—

"The object of the mining Acts is to promote the discovery of minerals in the lands of the Crown, and an inducement is held out to persons to search for them by enabling them to secure the exclusive possession of ground or rock in which they may have found minerals and to take the minerals for their own use. The essential thing to secure that privilege is the discovery of minerals, and the Act contains certain directions to enable the discoverer to describe and to secure his location, and to obtain the reward offered by the legislature for his industry.

"Such being the object and purpose of the Act, I think in construing it every reasonable intendment ought to be made to uphold the validity of a claim where there has been actual discovery and an honest attempt to comply with the directions of the legislature in staking and describing the location of the discovery."

In this case, as in *Clark v. Dockstader*, some regard must be had to the consequence of the decision appealed against, which cancels the stakings made. The result would be that as soon as the Recorder entered upon his books in the manner prescribed by the Act, that—to take the most important instance—the 9 claims of Cole junior had been cancelled, they would be immediately open for staking by the first person controlling three licences who was made aware or became cognizant of the cancellation. I ask, in all seriousness, is that person likely to be young Cole if the same Recorder-Magistrate should be still holding office at Red Lake?

The great mining industry of Ontario and other places is based on the activities and endurance of such prospectors as young Cole. In the face of hardships the most extreme, they venture, as he did, far into our remote hinterland and discover the location of minerals that but for their activities would long remain unknown. They merit all the consideration which our legislation intended they should receive; while those who would rob them of the fruits of their enterprise deserve nothing but execration.

I am firmly of opinion that the staking by Cole junior of the 9 claims K.R.L. 1628 to K.R.L. 1636 was in substantial conformity with the requirements of the Mining Act which were in force in March, 1926.

Accordingly the appeal should be allowed—the costs of trial and appeal to be paid by E. Dupont and Grafton Smith.

Appeal allowed.

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[APPELLATE DIVISION.]

PILLSWORTH V. TOWN OF COBOURG.

1930.

Payment—Whether Voluntary or Made under Compulsion—Local Improvement Rates—Protest—Recovery of Money Paid.

May 23.

The plaintiff, believing that certain taxes imposed upon his land by the council of the municipality in which he lived were illegally imposed under the Local Improvement Act (as was found to be the fact), declined to pay them, but subsequently paid them under protest in order to rid his land of the burden of the taxes, which he was obliged to do in order to obtain a loan of money upon a mortgage of the land:—

Held, that the plaintiff, being in immediate need of the loan and not being able to obtain it for a year or more if he brought an action to have the registration in the municipal treasurer's office of these taxes declared a cloud on his title, was under such compulsion as prevented the payment made by him under protest from operating as a voluntary payment, and was entitled to recover the money paid.

1930. The strict rules of the earlier cases have been substantially modified
 — by more recent decisions, such as *Maskell v. Horner*, [1915] 3 K.B.
 PILLSWORTH 106, and *Pople v. Town of Dauphin* (1921), 31 Man. R. 125, 60 D.L.R.
 v. 30.
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 COBOURG.

AN appeal by the plaintiff from the judgment of the County Court at the United Counties of Northumberland and Durham dismissing an action to recover \$176.67 paid to the defendants, the Corporation of the Town of Cobourg, for taxes and penalties alleged to have been illegally collected from the plaintiff.

April 8. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, J.J.A.

J. B. McColl, K.C., for the appellant, argued that payment of these taxes was made under protest and was not voluntary. The registration of this claim in the treasurer's office for unpaid taxes was a form of pressure or compulsion, and therefore the money could be recovered back: *Pople v. Town of Dauphin* (1921), 31 Man. R. 125, 60 D.L.R. 30; *Cushen v. City of Hamilton* (1902), 4 O.L.R. 265; *O'Grady v. City of Toronto* (1916), 37 O.L.R. 139.

F. M. Field, K.C., for the defendants, respondents, contended that the payment in question was voluntary, and at least that the kind of compulsion referred to in the cases had not been shewn: *Trusts Corporation of Ontario v. City of Toronto* (1899), 30 O.R. 209; Halsbury's Laws of England, vol. 7, p. 477, para. 973; *Denby v. Moore* (1817), 1 B. & Ald. 123; *Brown v. M'Kinally* (1795), 1 Esp. 279; *Brisbane v. Dacres* (1813), 5 Taunt. 143; *Andrew v. Bridgman*, [1908] 1 K.B. 596; *Marriot v. Hampton* (1797), Sm. L.C., 13th ed., vol. 2, p. 386.

May 23. The judgment of the Court was read by MASTEN, J.A.:—This was an appeal by the plaintiff from the judgment of O'Connor, Co. C.J., sitting in the 5th Division Court of the United Counties of Northumberland and Durham, dated the 27th January, 1930, dismissing an action to recover \$176.67.

The facts are not in dispute and the following statement is condensed from the judgment of the trial Judge:—

"The plaintiff's claim is to recover the sum of \$176.67, moneys had and received by the defendants, and being the return of certain local improvement taxes charged against the lands of the plaintiff situate on William-street, in the town of Cobourg, for the years 1923, 1924, and 1925, together with interest, said sum of money having been paid by the plaintiff to the defendants on the 13th April, 1926. The action was commenced by special summons on the 19th December, 1929. From the evidence it appears that a plank sidewalk situate on William-street, north of

the Grand Trunk Railway Company's lines, had fallen into a very bad state of repair, and, on the 25th July, 1921, the following resolution was passed by the town council: *That on account of the condition of the sidewalk on William-street north of the Grand Trunk Railway it is necessary to build a new walk under the Local Improvement Act, and it is resolved that same be built and one-half the cost be borne by the property-owners abutting thereon.*

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No notice of the intention of the defendant corporation to proceed with the work in accordance with the above resolution was served on the several property-owners; no accurate account of the actual cost of the work was kept, but the council estimated that the cost of the work was \$2,637.50, and assessed the various properties on which the walk fronted for payment of 50 per cent. of the same. No intimation was apparently specifically given to the plaintiff or to property-owners affected, as to the assessment for the work, until on or about the 16th July, 1923, when the council passed a by-law approving and ratifying the construction of the said work and certain assessments made in respect thereof. There is no question but that the proceedings of the defendant council in constructing the sidewalk in question as a local improvement were irregular, and to my mind the work done is not such work as is contemplated by the Local Improvement Act. Subsection 2 of sec. 3 of the Act in force at the time of these proceedings provides that nothing in this section shall extend or apply to a work of minor repair or maintenance. The work in question was undoubtedly one of repair, although the extent of that repair may have been quite considerable. The plaintiff states that for the first two years following the imposition of the taxes he offered to pay the town the taxes chargeable against his lands, with the exception of the local improvement tax, and that the tax collector refused to accept the same, but that later the money was accepted. The plaintiff then says that later, namely, on or about the 13th April, 1926, he required a loan on his property, and that the solicitor for the mortgagee insisted upon the taxes being paid before permitting the loan to go through, and the plaintiff says he paid the taxes under protest."

His evidence in that respect is as follows:—

"Q. Now then you say you paid at one time all of these three payments that you are now trying to get back? A. Yes.

"Q. How did you come to pay the taxes then, having refused to pay them before? A. I was forced to pay them, wanted to get a little money on the place. I was getting the money from Mr. Johnston. The Crown Attorney was doing the business, and he

- App. Div. wouldn't pass the loan unless I paid that, and I was forced to pay
1930. it, and want it back.
- PILLSWORTH v. A. In what way do you mean?
TOWN OF "Q. Any conditions at that time under which you paid it?
COBOURG. "Q. You see I can't ask you, or put the words into your mouth.
Masten, J.A. I see on this 'Paid under protest,' all that sort of thing. A. That's
how it was paid, under protest."

The letter forwarding the cheque in payment contains the following provision:—

"Enclosed you will please find cheque of Mr. William Johnston payable to Mr. Pillsworth and endorsed by Mr. Pillsworth to settle these taxes. Mr. Pillsworth is paying the full taxes under protest and reserves his rights to the return of the same, namely, the sidewalk tax and penalty thereon for 1923, 1924, and 1925."

I agree with the finding of facts by the trial Judge.

There is no question that there was no mistake of fact in this case, but the appellant contends that the registration in the office of the treasurer of this claim for unpaid taxes operated as a form of compulsion other than legal compulsion, in the circumstances here existing, so that the payment made by him is not a voluntary payment and the money may be recovered back.

The trial Judge, after reviewing the authorities, was of opinion that the facts did not disclose such compulsion as entitled the plaintiff to a recovery and he dismissed the action. In the course of his able judgment he says: "If it had not been for the fact that the plaintiff desired to secure a loan on his land, and in order to do so was compelled to have the charge of these taxes removed, it is not at all likely that he would have paid the taxes. His remedy at the time was to take proceedings to have this charge removed from his lands, but, instead of doing that, he simply authorised the solicitor who was putting through the loan to pay the tax, and in doing so to give notice that he was paying the same under protest. There is no evidence and it is not a fact that the lands of the plaintiff at the time of this payment were about to be sold or any proceedings in that direction taken by the defendants. To my mind, the circumstances of this payment were not such as to come within the authorities; and one could not find that payment was made by the plaintiff under threats, duress, or compulsion."

Out of respect for the able arguments which were adduced before us, I have examined all the cases which were cited, most of them being of a very ancient date and extending back as far as 1797.

A consideration of the more modern authorities indicates to me that the strict rules of the earlier cases have been substantially modified by these more recent decisions.

In *Maskell v. Horner*, [1915] 3 K.B. 106, the law up to that date was elaborately considered by a Court consisting of Lord Reading, Buckley, L.J., and Pickford, L.J. The plaintiff sued to recover back tolls which had been paid by him as a dealer in produce in the vicinity of Spitalfields Market. By a decision of the Court of Chancery in 1913 it was determined that these tolls had been unlawfully demanded, and thereupon the plaintiff brought his action for money had and received, to recover the tolls so paid, claiming that he paid them (1) under a mistake of fact and (2) not voluntarily but under the pressure of seizure or threatened seizure of his goods. The action was dismissed by Rowlatt, J., before whom it came for trial; on appeal to the Court of Appeal it was held that the tolls were not paid under any mistake of fact, but, reversing the decision of Rowlatt, J., on the second point, that the circumstances of the payments and the conduct of the plaintiff throughout the period of years shewed that he only paid to avoid seizure of his goods and never made the payments voluntarily, or intended to give up his right to the sums paid or close the transaction, and that he was entitled to recover under the second head of the claim the sums paid during the 6 years immediately preceding the action, the earlier payments being barred by the Statute of Limitations.

In the course of his judgment, at p. 118, Lord Reading says:—

“If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction (per Lord Abinger, C.B., and per Parke, B., in *Atlee v. Backhouse* (1838), 3 M. & W. 633, 646, 650). The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand (per Tindal, C.J., in *Valpy*

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App. Div. v. *Manley* (1845), 1 C.B. 594, 602, 603). There are numerous
 1930. instances in the books of successful claims in this form of action
 PILLSWORTH to recover money paid to relieve goods from seizure. Other
 v. familiar instances are cases such as *Parker v. Great Western Rail-
 TOWN OF way Co.* (1844), 7 Man. & G. 253, where the money was paid to
 COBBOURG. the railway company under protest in order to induce them to
 Masten, J.A. carry goods which they were refusing to carry except at rates
 in excess of those they were legally entitled to demand. These
 payments were made throughout a period of twelve months, always
 accompanied by the assertion that they were made under protest,
 and it was held that the plaintiffs were entitled to recover the
 excess payments as money had and received, on the ground that
 the payments were made under the compulsion of urgent and
 pressing necessity. That case was approved in *Great Western
 Railway Co. v. Sutton* (1869), L.R. 4 H.L. 226, 249, when the
 judges were summoned to the House of Lords to give their opinion.
 Willes, J., in stating his view of the law, said: 'When a man
 pays more than he is bound to do by law for the performance of a
 duty which the law says is owed to him for nothing, or for less
 than he has paid, there is a compulsion or concussion in respect
 of which he is entitled to recover the excess by *condictio indebiti*,
 or action for money had and received. This is every day's practice
 as to excess freight.' That is a clear and accurate statement in
 accordance with the views expressed by Blackburn, J., in the same
 case and adopted by the House of Lords."

In the case of *Campbell v. Halverson* (1919), 49 D.L.R. 463,
 the Court of Appeal of Saskatchewan considered this question.
 In that case the action was brought by the plaintiff to recover
 back a sum of \$1,000 paid by him to a pound-keeper under protest
 in order to gain possession of his animals, which sum had been
 subsequently paid over by the pound-keeper to the defendant, on
 whose lands it was alleged the damage had been done by the
 plaintiff's horses. The trial Judge found that the damage done
 amounted to only \$50, and gave judgment for the plaintiff for
 the excess, \$950, and the defendant appealed. The appeal was
 heard by Haultain, C.J., Newlands, J.A., and Lamont, J.A. (now
 Mr. Justice Lamont of the Supreme Court of Canada). The cases
 are reviewed at length and the modification of the earlier law
 to which I have already referred is pointed out in the judgment
 of Lamont, J.A. The case of *Maskell v. Horner*, above referred
 to, was discussed and followed, and the appeal was dismissed with
 costs.

In 1921 the question came before the Court of Appeal for
 Manitoba, consisting of Perdue, C.J., Cameron, Fullerton, and

Dennistoun, J.J.A., in *Pople v. Town of Dauphin*, 31 Man. R. 125, 60 D.L.R. 30. The head-note in 60 D.L.R. is as follows:—

“A tax paid under protest to a town municipality by an importer of mules, as a result of a notice served on him by the Bailiff of the town, and a threat to seize the animals if the tax is not paid, the arrangements for the sale having been completed at the time the notice was served, is not paid voluntarily and may be recovered back upon the Court deciding that the by-law under which it was collected did not apply to mules but only to horses.”

The principal judgment is written by Cameron, J.A., who agrees with the rule stated in Halsbury's Laws of England, vol. 7, para. 973, “that there may be practical as well as actual legal compulsion.” At p. 32 he said: “The above observation that there may be ‘practical’ as well as ‘actual legal compulsion’ is based on the judgment of Channell, J., in *North v. Walthamstow* (1898), 67 L.J.Q.B. 972, at p. 974, where he points out that where there is the necessity of a party acting at once, ‘less must be considered to amount to such compulsion as to prevent a man from being a mere volunteer than would be considered so to do in other cases.’” He deals with the subject at some length, and says further, at pp. 975 and 976: “So that it is not actual, or complete, or irresistible compulsion, as I may call it, which is necessary to bring the case within this doctrine.” He then proceeds to discuss the Ontario case of *Cushen v. City of Hamilton*, 4 O.L.R. 265, and distinguishes it, holding that, upon the facts of the case under his consideration, there was such compulsion as to prevent the Court from considering the plaintiff to be a mere volunteer when he made the payments.

In the present case the pressing necessity of making the loan is not especially emphasised in the evidence for the plaintiff, but it is plain that the plaintiff was in immediate need of the mortgage loan and could not have secured it for a year or more if he had been compelled to bring an action in the Supreme Court to have the registration in the treasurer's office of these taxes declared a cloud on his title. That seems to me to be such compulsion as prevents the payment made by him when made under protest from operating as a voluntary payment. Undoubtedly the case is very close to the border-line, but upon the best opinion that I have been able to form, after careful consideration of the authorities, I think that the appeal should be allowed and judgment entered for the plaintiff as prayed with costs.

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Appeal allowed.

[APPELLATE DIVISION.]

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DOWNEY v. HYSLOP.

May 23.

Negligence—Motor-vehicles upon Highway—Collision at Intersection of Streets in Town—Right of Way—Highway Traffic Act, secs. 35, 66—Operator's Licence—Effect of Driver not Having—Statutory Provision as to Crossing "Through Highway"—Effect of—Findings of Trial Judge—Evidence—Both Drivers at Fault—Degrees of Blame—Apportionment of Damages.

B-street, running north and south, is a main thoroughfare in a town, and is a "through street" within the meaning of the Highway Traffic Act, R.S.O. 1927, ch. 251. D-street, running east and west, crosses B-street at right angles. The plaintiff, driving his motor-car easterly on D-street, approached the intersection from the west. The defendant, driving his car southerly on B-street, approached the intersection from the north. The plaintiff saw the defendant's car when it was about 225 feet away, but the defendant did not see the plaintiff's car till it was only 25 feet from him. The plaintiff, before attempting to enter B-street, stopped his car at the west limit of that street as required by law. He looked to the right and to the left and saw two motor-cars approaching along B-street on each side of him, the defendant's car being the nearer of the two, but about 225 feet away. Judging that he had time to cross the west half of B-street and turn north upon it, he started his car across B-street, and was about half way across the centre line of B-street, when his car was struck by the defendant's car. He was injured and his car damaged. He was not the holder of an operator's licence, as required by sec. 66(1) of the Act:—

Held, that by sec. 66 the result of driving without a licence is liability to a fine; the unlicensed driver does not become an outlaw upon the highway; and the fact that the plaintiff had no licence was irrelevant to this action.

When the driver of a motor-vehicle, before entering or crossing a "through highway," brings the vehicle to a full stop, as required by sec. 35(2) of the Act, he has fulfilled completely the requirements of the statute; after that, he owes to others using the highway the common law duty of exercising due care not to injure another at the intersection—no more and no less.

In this case, the plaintiff's rights under sec. 35(1) were neither abolished nor modified in consequence of B-street being designated a "through" street; cars on the right coming towards the intersection had as against the plaintiff the right of way; over cars coming on his left he had the right of way.

Upon conflicting evidence, *held*, having regard to the findings of fact of the trial Judge, that the collision occurred in consequence of the combined negligence of both parties; and, the blame being apportioned one-third to the plaintiff and two-thirds to the defendant, the judgment of the trial Judge dismissing the action was reversed, and judgment was directed to be entered for the plaintiff for two-thirds of the damages assessed for his loss and injury.

AN appeal by the plaintiff from the judgment of the County Court of the County of Carleton dismissing an action to recover damages for personal injuries sustained by the plaintiff and injury to his motor-vehicle in a collision upon a highway with the motor-

vehicle of the defendant, by reason, as the plaintiff alleged, of the negligence of the defendant.

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May 5 and 6. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, JJ.A.

T. N. Phelan, K.C., and E. A. Richardson, for the appellant, argued that he was not guilty of any negligence which caused or contributed to the accident. The cause of the collision was the negligence of the defendant in driving at an excessive speed, failing to keep a proper lookout, approaching an intersecting street without having his car under proper control, and in failing to give due consideration to the rights of the appellant, who was approaching an intersection, and who was on the defendant's right hand side, and consequently had the right of way. The learned Judge erred in his conclusion of law that, after the appellant had stopped before entering a through street, all the duty and responsibility of taking care rested upon him: *Leckie v. Fee and Curtis* (1930), 38 O.W.N. 81. The fact that the appellant did not possess a chauffeur's licence was irrelevant. The appellant, by coming to a full stop, which he did before attempting to cross Beckwith-street, did all that he was required to do under the Highway Traffic Act, sec. 35, subsec. 2.

J. A. Hope, K.C., for the defendant, respondent, contended that the lack of a driver's licence was presumptive evidence of negligence on the appellant's part: *Yorke v. Continental Casualty Co. of Canada* (1929), 64 O.L.R. 109. The respondent, being on a through highway, had the right of way over any one entering such a highway from a side street. The evidence shewed that the appellant stalled on the intersection. It was through his negligence that the accident occurred: *Johnston v. Seagram* (1930), 38 O.W.N. 64; *Barron's Canadian Law of Motor-Vehicles*, p. 444; *Huddy on Automobiles*, 5th ed., p. 723; *Watt v. Reid*, [1930] 2 D.L.R. 215.

May 23. The judgment of the Court was read by MASTEN, J.A.:—Appeal by the plaintiff from a judgment of his Honour Judge Scott, sitting in the County Court of the County of Lanark, dated the 19th December, 1929, dismissing an action for damages to the plaintiff and to his automobile when struck by the defendant's automobile.

The appeal relates to a motor-accident which occurred about 9 o'clock p.m. on the 10th September, 1929, in the town of Smith's Falls. The scene of the collision was at the intersection of Davidson and Beckwith-streets. Beckwith-street, formerly Brockville-

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street, is a main thoroughfare of Smith's Falls, running north and south, and is a "through street" within the meaning of the Highway Traffic Act. Davidson-street runs east and west, crossing Beckwith at right angles. On the occasion in question the plaintiff, accompanied by his wife, while driving easterly on Davidson-street, approached the intersection from the west. The defendant, driving southerly on Beckwith-street, approached the intersection from the north. He was accompanied by two young ladies, all sitting in the driver's seat. The intersection is well lighted. The night was clear and visibility good. The plaintiff saw the defendant's car at a distance of about 225 feet away, but the defendant did not see the plaintiff's car till he was only 25 feet away from him. The plaintiff, before attempting to enter Beckwith-street, stopped his car at the west limit of that street, as required by law and by a stop-sign established by authority on Davidson-street, 6 feet west of Beckwith. He looked to the right and to the left and saw two motor-cars approaching along Beckwith-street on each side of him, the defendant's car being the nearer of the two, but at about that time about 225 or 230 feet away. Thereupon he judged that he had time to cross the west half of Beckwith and turn north on that street. He started his car across Beckwith-street and was struck by the defendant's car when his (the plaintiff's) car was about half way across the centre line of Beckwith-street. His car was damaged to the extent of \$400 and he suffered serious personal injury. He sues for \$500. The trial Judge dismissed the action. In the beginning of his reasons for judgment the trial Judge says:—

"Section 66(1) of the Highway Traffic Act, R.S.O. 1927, ch. 251, provides that 'no person other than one holding a chauffeur's licence shall operate or drive a motor-vehicle in a highway unless he holds an operator's licence issued to him under this section.' The plaintiff was not, at the time of the occurrence in question, the holder of such a licence and therefore, while perhaps not a trespasser on the highway, he was operating his car thereon without lawful authority. This lack of certified competency, an absolute requirement under the present law, imposed upon him the duty of observing special care and caution and rendered his position on any highway servient to that of any other operator thereon who had acquired the statutory qualification. His presence then, under this handicap, upon a highway in charge of and in the act of operating a motor-vehicle, was an evidence of presumptive negligence."

And at a later stage in his judgment he says:—

"Apart from his inferior status as an unlicensed operator upon any highway, he was in the subordinate and subservient position of any driver attempting to cross a 'through' street. With regard to the plaintiff the defendant was in a dominant position. Being on a 'through highway,' he had the right of way over any one entering such highway, from side-roads and from either direction. According to the evidence, the plaintiff was at the stop-sign on Davidson-street when the defendant passed the arc-light in the centre of the block, and there was no reason why the former's car could not then be seen. The defendant, however, insists that he did not see the plaintiff until the latter had emerged from Davidson-street, and until his car had got within 20 feet of it."

Again he observes:—

"Now, according to Judge Barron in his work on Motor-Vehicles at p. 444, 'there is no statutory duty cast upon the driver on the 'through highway' to guard against drivers entering such 'through highway,' from one side or the other; but . . . they have the right to assume that the latter will observe the law.' The meaning is that the two drivers concerned do not enjoy equal rights at such points, that an attempt by a driver along a side-street to cross a 'through highway' must be at his own risk and that his movements must be such as will ensure safety."

In these observations I think the trial Judge was in error. First, with regard to the question of licence, the statutory provision is sec. 66 of the Highway Traffic Act, and by it the result of driving without a licence is liability to imposition of a fine. The driver without a licence does not become an outlaw upon the highway, and the want of a licence is irrelevant to this action unless it is established that the absence of the licence contributed to the accident, which seems to me absurd.

With regard to the second point, namely, the relative rights and precedence of drivers at the intersection of a cross-road with a "through" street, the provision of the Highway Traffic Act is found in sec. 35, subsec. 2, and reads as follows:—

"The operator or driver of every vehicle shall immediately before entering or crossing a through highway bring the vehicle to a full stop."

When he comes to a full stop he has fulfilled completely the requirements of the statute. After that he owes to others using the King's highway the common law duty of exercising due care not to injure another at the intersection, no more, no less; and, moreover, the plaintiff's rights in this case under sec. 35, subsec. 1.

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remain in my opinion unaffected. The plaintiff, in entering upon Beckwith-street and securing a place in the line of travel in that "through" street, was bound to exercise due care not to come into collision with others lawfully using that highway, but his rights and obligations under sec. 35(1) of the Act are neither abolished nor modified in consequence of Beckwith-street being designated as a "through" street. Cars on the right coming toward the intersection had as against the plaintiff the right of way; over cars coming on his left he had the right of way. The view of the trial Judge on these two points of law seems to me to be fundamentally important, and, being in my view erroneous, a consideration of the facts in an aspect entirely new is necessary.

The evidence regarding the exact occurrences immediately preceding the collision is conflicting. If, as alleged by the plaintiff's witnesses, the defendant was 234 feet away from the intersection when the plaintiff brought his car to a stop, and if thereupon the plaintiff immediately proceeded to enter Beckwith-street and continued at a reasonable pace without stopping, the defendant must have been approaching the intersection at an unwarrantable speed, and the plaintiff would be free from blame. If on the other hand, as suggested by the respondent (defendant), the plaintiff stopped still so long after his first observation that, as he entered the paved *via trita* of Beckwith-street, the defendant was only 75 feet away, and if, as also suggested, he then stalled his motor-car in the middle of the highway, blame would seem to rest in some degree at least on him, though even then, if the defendant had had his car under proper control and his wits about him, there was room for him to swerve to the right into Davidson-street, but by an error of judgment he swung to the left and so collided with the plaintiff.

Considering on the one hand the findings of fact by the trial Judge so far as they implicate the plaintiff, which on the conflicting evidence I do not think we can reverse, and considering on the other hand the evidence of negligence on the part of the defendant, including his own admission that he paid no attention to approaching traffic from the right or left, and that his vision was concentrated on the line of traffic ahead until this line was obstructed by the plaintiff at a distance of 25 feet away, I think we are led to the conclusion that the collision occurred in consequence of the combined negligence of both parties; and, speaking for myself, I would apportion the negligence one-third against the plaintiff and two-thirds against the defendant.

I think it is unnecessary to send the case back for a new trial to assess the damages—\$500 is all that is claimed, and the evidence fully justifies that amount.

The appeal should be allowed and judgment entered for the plaintiff for \$333.33, with costs of the appeal and of the action.

Appeal allowed.

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[IN CHAMBERS.]

DUCHMAN V. OAKLAND DAIRY CO. LTD.

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Costs—Taxation—Interpretation of Order of Appellate Court—Joinder of Plaintiffs—Rule 66—General Principles of Taxation—Power of Court—"Otherwise Order"—Apportionment of Costs Left to Taxing Officer.

May 26.

D., the owner of land adjacent to the defendants' dairy, and five of his neighbours, joined in an action in the Supreme Court of Ontario for an injunction restraining the defendants from operating their dairy in a manner alleged to constitute a nuisance, and for substantial damages. By the decision of the trial Judge damages were awarded but an injunction was refused. Upon appeal to a Divisional Court, 63 O.L.R. 111, an injunction was awarded in favour of the plaintiff D. and he was awarded \$400 damages. Two of the other plaintiffs were awarded \$50 damages, the fourth \$40, and the claims of the other two were dismissed. The Divisional Court ordered the defendants to pay D.'s costs of the action and the two unsuccessful plaintiffs to pay to the defendants their costs of the action. As between the three plaintiffs who recovered nominal damages and the defendants there was no order as to costs. D. was allowed his costs of the appeal against the defendants and the defendants their costs of the appeal as against the five unsuccessful plaintiffs. The apportionment of costs was left to be worked out by the taxing officer, who ruled that the award of costs to D. gave to him all the general costs of the action upon the Supreme Court scale, and that the defendants were entitled to tax against the two plaintiffs (L. and A.) whose costs they had been ordered to pay only the costs occasioned by the joining of these plaintiffs:—

Held, upon appeal, that the action was properly brought in the Supreme Court, and should not have been brought in a County Court, regard being had to the relief actually awarded: the subject-matter of the litigation transcended the County Court jurisdiction, and the title to an easement was in question; the injunction was not a mere incident to that which was sought, but was the real subject-matter of the litigation, while the damages awarded were merely incidental. *Dominion Loose Leaf Co. Ltd. v. Manuel* (1925), 57 O.L.R. 84, followed.

Held, also, that the taxing officer was right in his ruling; and that, unless the Court awarding costs thinks it just to depart from well-settled principles of general application and to "otherwise order," the rule laid down in *Gort v. Rowney* (1886), 17 Q.B.D. 625, should be followed in the taxing office.

Gort v. Rowney, though it has been adversely criticised, was not overruled by *Terry v. Gould* (1924), 69 Sol. J. 212.

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The different way in which costs awarded to a successful plaintiff and costs awarded to a successful defendant have been dealt with by the Courts, pointed out.

In many cases there is a special reference to the taxing officer to inquire whether there is a specific bargain between the client and the solicitor governing the situation; and, *semble*, the taxing officer may, without a special reference, inquire and act accordingly.

Review of the authorities.

In re Colquhoun (1854), 5 DeG. M. & G. 35, specially referred to. Rule 66, as to the joinder of plaintiffs, considered.

AN appeal by the defendants from a certificate of the taxing officer, upon the taxation of costs, determining, before actual taxation, the principle by which the taxation should be governed.

May 6, 1930. The appeal was heard by MIDDLETON, J.A., in Chambers.

R. L. Kellock, for the defendants.

R. T. Harding, K.C., for the plaintiffs.

May 26. MIDDLETON, J.A.:—Solomon Duchman, the owner of a parcel of land adjacent to the defendants' dairy, and five of his neighbours, joined in an action claiming an injunction restraining the defendants from operating their business in a manner alleged to constitute a nuisance, and claiming substantial damages. The claim for damages was in the end found to be grossly exaggerated, and by the decision of the trial Judge damages were awarded, but an injunction was refused. Upon appeal to a Divisional Court (*Duchman v. Oakland Dairy Co. Ltd.* (1928), 63 O.L.R. 111), an injunction was awarded in favour of the plaintiff Duchman and he was further awarded \$400 damages. Two of the other plaintiffs, husband and wife, were given \$50, the fourth plaintiff was given \$40, and the claims of the remaining two plaintiffs were dismissed, because of their acquiescence in the establishing of the dairy, in that they signed a petition in favour of the granting of a licence.

The Divisional Court gave to Duchman the costs of the action and gave to the defendants their costs of the action as against the two unsuccessful plaintiffs. As to the three plaintiffs who recovered nominal damages, no costs were given to either side. Duchman was given the costs of the appeal to the Divisional Court and the defendants were given their costs of the appeal as against the five unsuccessful plaintiffs. As a matter of substance, substantial victory was with the plaintiff Duchman, as the injunction was a matter of very serious importance. The actual damages given were for injuries sustained up to the date of the hearing, and form no index to the importance of the matter actually involved.

The actual order of the Court seems to have been a compromise to enable some judgment to be pronounced, as the individual opinions of the Judges in the Divisional Court as to the ground upon which relief should be awarded and as to the disposition of costs were hopelessly irreconcilable, while there was substantial unanimity as to the main matters in dispute.

One can only regret that the apportionment of costs was left to be worked out in the taxing office, as, no matter what the result may be there, it is probable that substantial justice will not in the end be done.

Two radically different views were put forward in the taxing office as to the actual operation of the judgment of the Court. The contention of the plaintiff Duchman, which was adopted by the learned taxing officer, is that the award of costs to that plaintiff gives to him all the general costs of the action upon the Supreme Court scale, and that the defendants are only entitled to tax as against the two plaintiffs against whom costs have been awarded the costs occasioned by the joining of these plaintiffs, the taxing officer being of opinion that the decision in the case of *Gort v. Rowney* (1886), 17 Q.B.D. 625, governs.

The contention of the defendants is that, whatever costs Duchman is entitled to tax, they must be allowed him on the County Court scale with a set-off under Rule 649; and that Duchman is not entitled to tax all the general costs of the action but only some proportion thereof, presumably one-sixth, because there were six parties plaintiff joining in the litigation; and, thirdly, that the defendants are entitled to tax against the plaintiffs Labowitz and Applebaum their general costs of the action, or some aliquot part thereof.

I am quite satisfied that this action should not have been brought in the County Court, regard being had to the relief actually awarded. The case is, I think, governed by *Dominion Loose Leaf Co. Ltd. v. Manuel* (1925), 57 O.L.R. 84. The subject-matter of the litigation greatly transcended the County Court jurisdiction, and furthermore the title to an easement was in question. The injunction was by no means a mere incident to that which was sought but was the real subject-matter of the litigation. The damages awarded were a mere incidental factor.

Upon the argument of the appeal, the binding effect of the decision in *Gort v. Rowney*, relied upon by the taxing officer, was strenuously attacked, and I am called upon to consider whether it can now be regarded as a governing authority.

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Before the amendment of the rule following the decision of the House of Lords in *Smurthwaite v. Hannay*, [1894] A.C. 494, the plaintiffs joining were required to be all interested in the subject-matter of the action, and, consequently, little hardship was imposed upon the defendant by the joining of additional parties plaintiff. This led to the rule as to costs now crystallized and found in the last part of Rule 66, dealing with the joinder of plaintiffs. This provides that, where plaintiffs are joined, the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person who is not found entitled to relief, unless the Court otherwise orders. Now that plaintiffs are given such a wide right to join in the one action, it may well be that the justice of this rule is not altogether apparent, and that the cases in which the Court should otherwise order are more numerous than the cases in which the Court should not interfere. This would be particularly so in cases of which *Keen v. Towler* (1924), 41 Times L.R. 86, and *Terry v. Gould* (1924), 69 Sol. J. 212, will serve as examples. These are cases in which several persons were injured in automobile accidents and joined in a common suit, one succeeded and others failed, and there is an element of fairness in suggesting that the costs of both plaintiffs and defendant should be divided.

In cases such as the one in hand, where the defendants were supposed to be committing a nuisance, and the main plaintiff sought to fortify his position by having his neighbours join with him, the practice seems to be very clearly settled. I would refer to the case of *Umfreville v. Johnson* (1875), L.R. 10 Ch. 580, where in a nuisance action one plaintiff made out a good case, but the second plaintiff failed. The defendant was there ordered to pay the costs of the action to the successful plaintiff and the costs occasioned by the addition of the unsuccessful plaintiff were ordered to be deducted.

It must be borne in mind that there has been from the earliest days marked distinction in the way in which costs awarded to a successful plaintiff and costs awarded to a successful defendant have been dealt with by the Courts. The retainer of a solicitor by several plaintiffs is a joint and several retainer and each plaintiff is *primâ facie* liable to the solicitor jointly and severally for all the costs of the action; and for this reason, satisfactory or unsatisfactory, costs awarded to one plaintiff to secure him indemnity carry all the general costs. In the case of defendants the contrary rule has always prevailed: unless the retainer otherwise provides, each of several defendants employing a common solicitor becomes

liable to the solicitor only for an aliquot portion of the general costs, and so for his indemnity is allowed only the share of costs to which he is liable. In both cases, that of the plaintiff and that of the defendant, this rule is applicable only where there is no specific bargain between the client and the solicitor governing the situation; hence in many cases there is a special reference to the taxing officer to inquire into this question, and I know no reason why, without a special reference, the taxing officer may not inquire into the true situation and act accordingly.

All this was discussed at length in the report of the Senior Taxing Officer adopted by the Lords Justices and Vice-Chancellor Stuart in *In re Colquhoun* (1854), 5 DeG. M. & G. 35, a decision that, so far as I know, has never been questioned or in any way departed from.

This is concisely stated in the judgment in *Beaumont v. Senior*, [1903] 1 K.B. 282, thus: "Where two defendants are jointly represented by the same solicitor, and judgment with costs is given in favour of one defendant and against the other, the successful defendant is, in the absence of any agreement between him and his co-defendant as to how their costs are to be borne *inter se*, entitled to recover from the plaintiff half the costs of the defence." The Registrar had based his decision upon the decision in *Gort v. Rowney*, assuming that what was sauce for the goose was sauce for the gander, and that therefore the successful defendant is only entitled to the extra costs occasioned by the addition of the unsuccessful plaintiff. This departure from principle was promptly rectified.

Ellingsen v. Det Skandinaviske Compani, [1919] 2 K.B. 567, is to the same effect, and is also a case of costs awarded to one of several defendants.

Terry v. Gould, *supra*, reported only in the Solicitors Journal, is mainly relied upon as having displaced *Gort v. Rowney*. Had that been recognised as the effect of the decision, I cannot believe that the case would not have found its place in the regular reports. It is true that there is adverse criticism of *Gort v. Rowney*, but in the result I think it plain that the Lords Justices did not overrule that decision. Indeed they could not do so, because it was binding upon them.

There is a failure to appreciate the fact that the decision in *In re Colquhoun* did not touch the plaintiffs' right at all, but was confined to the case of defendants. The case was also complicated by the fact that the successful plaintiff was a wife injured in an

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automobile accident, who recovered against a negligent defendant, although her husband who joined with her failed because he was also negligent. . The wife was in no sense affected by or answerable for her husband's negligence. The main contention was that, *primâ facie*, the husband and wife joining in bringing an action, the solicitor would look to the husband for his costs, and the case was referred to the Taxing Master to inquire as to the nature of the wife's obligation to the solicitor. In the contemporary Weekly Notes the case is not even mentioned in the notes of cases, as it surely would be if any one thought that *Gort v. Rowney* was overruled. In the Daily Record of Business, [1924] W.N. 259, the note is, "Referred back to Taxing Master."

It is plain, however, that the Court thought that the case depended upon the special terms of the order made by the Judge, for it is said, "Here the Judge has given a special direction and in my opinion for good causes and I entirely agree with my Lord as to the results that follow."

In *Keen v. Towler*, *supra*, Lord Darling was also confronted with the situation as a trial Judge, and he discussed at some length the problem presented and expressed the opinion that the general rule should not be regarded as applicable to cases joined under the modern practice, and concluded that he, as trial Judge, undoubtedly had the power to do justice in the particular case by making a just order. He says: "Even if I am wrong as to the event, I have, I think, 'good cause' to 'order otherwise,' and I think that the order I propose to make is the right one."

In the result, I arrive at the conclusion that the taxing officer is right in his ruling; and that, unless the Court awarding costs thinks it just to depart from well-settled principles of general application and to "otherwise order," the rule laid down in *Gort v. Rowney* should be followed in the taxing office. In this case no inquiry appears to have been had, and perhaps none was called for, but it is altogether likely that Duchman was in fact responsible to his solicitor for the entire costs.

The appeal is therefore dismissed with costs.

[IN CHAMBERS.]

RE RIDLER.

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May 29.

Lunatic — Confinement in Hospital for the Insane — Application for Declaration of Lunacy and Appointment of Wife as Committee—Opposition by Public Trustee—Hospitals for the Insane Act, secs. 36, 37, 40-43, 52—Amending Act, 20 Geo. V. ch. 66, secs. 2, 3.

There is nothing in the amendments made in 1930 to the Hospitals for the Insane Act, R.S.O. 1927, ch. 353, by 20 Geo. V. ch. 66, whereby secs. 40, 41, 42, and 43 of the principal Act were repealed, and a new sec. 40 substituted therefor, and whereby sec. 52 was also repealed and a new sec. 52 substituted, to indicate that the jurisdiction and power of the Court to make lunacy orders affecting inmates of provincial hospitals for the insane has been taken away or interfered with; and the Court, upon an application for an order declaring lunacy, will be governed, not by any consideration of the policy of the Public Trustee, but by consideration of the rights and welfare of the alleged lunatic and those dependent upon him, having regard to the nature of his estate.

The Legislature in amending the Act had no intention of changing the law or practice theretofore in force as to the appointment of committees by the Court. The power of the Court to appoint a committee under sec. 36 of the Act, upon notice to the Public Trustee under sec. 37, is left untouched.

An application for a declaration of lunacy in respect of an inmate of a hospital and for the appointment of the applicant, the wife of the lunatic, as committee of the person and estate, was granted, notwithstanding the opposition of the Public Trustee, who contended that the Act as amended vested in him all the necessary powers which a committee appointed by the Court could exercise, and that the estates of lunatics could be better managed by him than under the supervision of the Court.

MOTION by Annie Maud Ridler, wife of Edgar Rupert Ridler, for an order declaring that he is a lunatic and appointing her the committee of his person and estate.

May 23. The motion was heard by ORDE, J.A., in Chambers. *W. B. Raymond*, K.C., for the applicant.
K. V. Stratton, for the Public Trustee.

May 29. ORDE, J.A. :—The wife of Edgar Rupert Ridler moves for an order declaring that he is a lunatic and appointing her as the committee of his person and estate. He is confined in an Ontario hospital established under the Hospitals for the Insane Act, R.S.O. 1927, ch. 353, and due notice of the application was given to the Public Trustee, as required by sec. 37 of that Act, as well as to the alleged lunatic himself.

Upon the material filed in support of the application, there can be no doubt of Ridler's condition, but the application is opposed by the Public Trustee.

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This opposition is based upon certain amendments to the above mentioned Act passed at the last session of the Legislature by 20 Geo. V. ch. 66. By sec. 2 thereof, secs. 40, 41, 42, and 43 of the Hospitals for the Insane Act (which for convenience I shall refer to as the Hospitals Act) are repealed, and the following is substituted therefor:—

“40. The Public Trustee as statutory committee of any such patient shall have and may exercise all the rights and powers with regard to the estate of the patient that such patient would have if of full age and of sound and disposing mind.”

Mr. Stratton says that, in view of these amendments, it will henceforth be the policy of the Public Trustee to oppose all applications for lunacy orders whenever the alleged lunatic is an inmate of an Ontario hospital for the insane, upon the ground that the Hospitals Act, as now amended, vests in the Public Trustee all the necessary powers which a committee appointed by the Court could exercise, and that in such cases no appointment of any other committee should be made, unless the circumstances are very exceptional.

I think it well to say at the outset that the Court ought not to be, and, while I am exercising the powers of the Court, will not be, moved or affected by any consideration of the policy of the Public Trustee, but will be governed by the rights and welfare of the alleged lunatic and of those dependent upon him, having regard to the nature of his estate.

It is to be observed that there is nothing whatever in the amendments of last session to indicate that the jurisdiction and power of the Court to make lunacy orders affecting inmates of provincial asylums has been interfered with or taken away in the slightest degree. The new section 40 merely in one section embodies, though in somewhat different language, the powers conferred upon the Public Trustee as the statutory committee by the repealed sections 40, 41, 42, and 43, eliminating the consent of the Attorney-General to any lease, sale, mortgage or conveyance of the lunatic's property.

But the power of the Court to appoint another committee under sec. 36, notice being first given to the Public Trustee under sec. 37, is left untouched and remains the same as before. So that it is quite clear that the Legislature at its last session had no intention of changing the law or practice theretofore in force as to the appointment of committees by the Court.

When the sections of the Hospitals Act which are grouped

under the heading "The Statutory Committee of Patients in Asylums," namely, sec. 35 *et seq.*, even as amended by the Act of last session, are examined, it is reasonably plain that the Legislature not only never intended it to be the general rule that the Public Trustee should act as committee, in lieu of a committee appointed by the Court, but that it was rather an exception intended only to safeguard the interests of the lunatic until the Court acted, or perhaps in cases where the estate of the lunatic was trifling and required little, if any, management.

The suggestion that the well-settled practice of the Court should now be changed merely because the Public Trustee thinks that the estates of lunatics in Ontario hospitals can be better managed by his office than under the supervision of the Court, is a startling one. If acceded to, it would mean that in the great majority of such cases there would be substituted for the control of the Court the unfettered, autocratic control of an individual, by whom decisions could be made without the production of evidence in the ordinary way, in the absence of counsel and without any appeal. Is the Court to lend itself to the adoption of any such policy? Contrast the dangers attendant upon the exercise of any such autocratic power with the safeguards provided by the law and practice upon lunacy applications to the Court.

When a lunacy order is made, the matter is almost invariably referred to the Master or a Local Master of the Supreme Court, whose duty it is to hear evidence, in the presence of counsel, as to the lunatic's estate, and as to what is necessary for the maintenance of the lunatic and his family and also as to how the estate should be managed, what portions, if any, ought to be sold, etc. Upon that the Master makes a report which propounds a scheme for the maintenance of the lunatic and his family, and makes whatever recommendations he thinks are proper as to the management and disposition of the estate. That report then comes before a Judge for confirmation or otherwise as may seem to him best. And there is the further safeguard in whatever right of appeal to the Appellate Division is afforded by the Rules.

Counsel for the Public Trustee pointed to the new section 52,*

* 52. The Public Trustee shall, out of the money in his hands belonging to a patient for whom he is statutory committee, pay the proper charges for his maintenance in the hospital in which he is confined, and he may also pay such sums as he may deem advisable to the family of such patient or other person dependent upon him, and the payments for the maintenance of the family and other dependants may be made notwithstanding that such payments may prevent the payment of maintenance which otherwise would be due from the patient.

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passed by the Act of last session, as empowering the Public Trustee to make sufficient provision for the maintenance of the lunatic's family, but the provision as to the maintenance of the lunatic's family is not new. That was provided for by the old section. The significant change is that, while, before, the payments to the family required the authority of the Lieutenant-Governor in Council, that is, the Executive Council or Cabinet of the Provincial Government, the new section vests the power in the Public Trustee alone.

In fact the only vital changes in the law effected by the new sections 40 and 52 are that the control which the Attorney-General and the Lieutenant-Governor in Council previously exercised over the Public Trustee is removed and he is empowered to act alone.

One can imagine the case of a wealthy man confined in an asylum and possessing an estate which produces a large income. He has a wife and large family accustomed to a certain mode of life, children, perhaps, whose education costs a great deal of money, but all well within his income. Which is safer, to have the question of what would be a proper sum to allow for the maintenance of the wife and children determined, as it now is, according to the practice of the Court, with all the safeguards already mentioned, or by the arbitrary decision of a Public Trustee?

Suppose the particular occupant of that office for the time being should think it better to send the children to a less expensive school, or that the wife should give up her motor-car or some of the household servants, would it be proper that his views should prevail without any appeal therefrom? And the same objection would apply to moderate estates as well as wealthy ones.

The suggestion that our well-settled practice should be varied because of the proposed new policy of the Public Trustee is fraught with grave danger. To accede to it would be to increase that type of bureaucratic control over the rights and liberties of the subject which is a feature of much of our modern legislation, as has been pointed out by Lord Hewart, the present Lord Chief Justice of England, in his book "The New Depotism." The Court must, in the public interest, set its face against any such departure from the present law and practice.

For these reasons, I deal with this application despite the objections of the Public Trustee.

As I have said already, there is no doubt as to the lunacy. The estate is sufficiently large to justify the application, and the two adult children approve. There will, therefore, be an order declaring Ridler a lunatic and appointing his wife, the applicant, the

committee of his person and estate, upon furnishing security to the satisfaction of the Master of the Supreme Court, with a reference to the Master for such purpose, and to propound a scheme for the maintenance of the lunatic and his family, together with such other provisions as to costs and otherwise as are customary; the costs of the applicant to be as between solicitor and client. The costs of the Public Trustee, which I fix at \$20, should be paid out of the estate.

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Municipal Corporations—Franchise Agreement between Town Corporation and Dominion Railway Company—Termination by Effluxion of Time—Construction of Municipal By-law and Agreement—Ontario Railway Act, 1913, secs. 246, 259—Application of—Effect of Agreement between another Railway Company and a City Corporation—14 & 15 Geo. V. ch. 119 (Ont.)

By by-law No. 271 of the plaintiff corporation, passed on the 14th July, 1914, the plaintiff corporation granted to the defendant company a franchise for a line of railway for a period of 15 years from the 28th July, 1914, upon and subject to the terms of the by-law and of an agreement dated the 23rd July, 1914, between the plaintiff corporation and the defendant company. By clause 17 of the by-law the rights and privileges thereby granted were to continue for 15 years, subject to the provisions and conditions therein set forth being strictly performed and observed by the company. The 15 years expired on the 23rd July, 1929, and notice was duly given by the plaintiff corporation to the defendant company to discontinue operations and remove its tracks and equipment. By clause 20 of the by-law it was provided that "all matters of dispute arising under this agreement may be referred by either party to the Ontario Railway Board, who shall hear all matters relating to an alleged violation of the terms of this agreement, and shall make such order as to it may seem just, as provided for under the Ontario Railway Act, 1913, the provisions of which said Act, in so far as they do not conflict with the terms of this agreement, form part of this agreement, and are binding on both parties hereto." The defendant company's railway was of Dominion origin:—

Held, that the words italicised should be read and construed as though they were followed immediately by some such words as "relating to disputes;" for, as clause 20 purports to deal only with matters of dispute, it is as to such matters only that the Ontario Railway Board is to be given jurisdiction; and, if the entire Act was, by these words, intended to be made applicable, it was unnecessary by clause 7 of the by-law to provide that certain specific paragraphs of sec. 259 of the Act should apply.

Assuming that the whole Act is intended to apply, and therefore sec. 246, as contended for the defendant company, that section cannot, by the very terms of clause 20, apply, if its language conflicts with the terms of the agreement.

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Section 246 should be read in connection with clause 17 of the by-law; and there is nothing in that clause nor anywhere else in the by-law or agreement imposing any obligation upon the municipality to assume the ownership of the railway at the end of the term, or, in default of so doing, be obliged to submit to the privileges of the company under the agreement being indefinitely extended until the ownership is assumed.

The railway being one of Dominion status (62 & 63 Vict. ch. 77, Dom.), sec. 246 of the Ontario Act has no application in so far as it is sought thereby to impose an obligation on the municipality to assume the ownership of the railway or in default submit to the continued exercise of the company's privileges notwithstanding the expiration of the term of the franchise.

The benefit of a certain agreement dated the 1st September, 1925, authorised by the City of St. Catharines Transportation System Act, 14 Geo. V. ch. 119 (Ont.), between another railway company, Canadian National Electric Railways, and the Corporation of the City of St. Catharines, having been assigned to the defendant company, it was argued that whatever right the plaintiff corporation may have had originally to put an end to the defendant company's franchise had been, by virtue of this agreement and statute, entirely lost or had become subject to the terms of this agreement and statute:—

Held, that what Canadian National Electric Railways "offered to provide and operate," as recited in the agreement, could only have been, in so far as the plaintiff corporation was concerned, the unexpired term of the Merritton franchise, with such extended term as might be arranged with that municipality; sec. 4 of the statute expressly providing that, in the event of purchase of the system by the city corporation and its subsequent operation, such operation, as regards lines beyond the city's limits, shall be carried on in accordance with an agreement to be entered into with the municipality in which those lines exist, or failing such agreement in accordance with terms to be imposed by the Railway Board.

The franchise having come to an end by effluxion of time, the plaintiff corporation was entitled to the relief claimed in the action, but the injunction restraining the defendant company from carrying on its operations and the mandatory order for the removal of its tracks, etc., should not take effect until the 1st January, 1931.

AN action brought by the Municipal Corporation of the Town of Merritton for a declaration that the franchise agreement dated the 23rd July, 1914, having terminated, as the plaintiff corporation alleges, on the 28th July, 1929, the defendant company has no longer any right to maintain its tracks, poles, wires, etc., on the streets of the plaintiff corporation; for an injunction restraining the defendant company from operating within the limits of the plaintiff municipality; for a mandatory order compelling the defendant company to remove its tracks, poles, equipment, etc.; for damages for trespass from and after the 29th July, 1929; and for such further and other relief as the case may require.

The action was tried before GARROW, J., without a jury, at St. Catharines.

G. R. Geary, K.C., and *A. W. Marquis*, K.C., for the plaintiff corporation.

A. Courtney Kingstone, K.C., and *R. E. Laidlaw*, for the defendant company.

May 31. GARROW, J.:—Counsel for the parties agreed to a statement of facts as follows:—

1. The St. Catharines Street Railway Company, incorporated by special Act (Ontario, 1874, 38 Vict. ch. 63), was, by by-law No. 34 of the plaintiff corporation, passed on the 27th day of March, 1879, granted a franchise to construct and operate a line of railway on the street (*inter alia*) in Merriton then known as the Thorold Macadamised Road, from the limit of the city of St. Catharines to the limit of the town of Thorold.

2. The said line of railway was constructed and put into operation in 1879, under the provisions of said by-law No. 34, and was originally operated by horse-cars and subsequently (in or about 1887) electrified, and, under successive franchises hereinafter referred to, it has since 1879 been continuously operated up to the present time and is the line of railway which is the subject of this action.

3. The franchise granted by said by-law No. 34 was not stated to be for any fixed or limited period.

4. In 1882, by 45 Vict. ch. 63, the name of the St. Catharines Street Railway Company was changed to "The St. Catharines Merriton and Thorold Street Railway Company," and at a later date the assets of the company were sold to Messrs. Dawson & Symmes, and by them to a company incorporated under the Ontario Joint Stock Companies Letters Patent Act, by letters patent dated the 28th June, 1893, under the name of "Port Dalhousie St. Catharines and Thorold Electric Street Railway Company Limited."

5. Subsequent to said by-law No. 34, the plaintiff corporation passed amending by-law No. 71 on the 2nd day of May, 1887, and by-law No. 77 on the 9th day of July, 1888, in respect of certain matters, and on the 5th day of May, 1893, passed by-law No. 108, permitting Messrs. Dawson & Symmes (the then owners of the railway) to make certain changes in the character of the railway tracks and continuing in force the provision of the said by-law No. 34 as binding upon the said Dawson & Symmes and any company they might incorporate, the terms of said by-law No. 108 being accepted by said Dawson & Symmes by an agreement with the plaintiff corporation dated the 6th day of May, 1893.

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6. On the 25th day of July, 1894, the plaintiff corporation passed its by-law No. 117, whereby it granted to the Port Dalhousie St. Catharines and Thorold Electric Street Railway Company Limited a franchise to construct and operate the said mentioned line of railway, subject to the provisions of the by-law and to the terms of an agreement dated the 14th August, 1894, entered into between the said company and the plaintiff corporation pursuant thereto.

7. The said by-law No. 117 repealed all by-laws theretofore passed by the plaintiff corporation conferring any rights or privileges upon the St. Catharines Street Railway Company or in any way relating to the same, but, the said by-law No. 117 not having contained any provision fixing the period for which the franchise was thereby granted, the plaintiff corporation on the 14th day of August, 1894, passed its by-law No. 118 amending the said by-law No. 117 by fixing the period of franchise at 20 years from the date of the said by-law No. 118.

8. The said Port Dalhousie St. Catharines and Thorold Electric Street Railway Company Limited continued the operation of the said line of railway until in or about the year 1903, when, under the provisions of the Ontario statute, 1902, 2 Edw. VII. ch. 93, it sold its undertaking, including the said line of railway, to the defendant company, which had been incorporated in 1899 by Dominion statute 62 & 63 Vict. ch. 77, with power granted by the Dominion statute, 1901, 1 Edw. VII. ch. 76, to acquire the said undertaking; and upon the sale of its undertaking, assets, etc., the Port Dalhousie St. Catharines and Thorold Electric Street Railway Company Limited ceased to operate as a railway company, and the assets, etc., thereof became part of the undertaking of the defendant and have since been operated as part of the said undertaking.

9. In or about 1908 the defendant corporation became one of the constituent companies of the Canadian Northern Railway System, and as such is included in the schedule to the Canadian National Railway Company Act (Canada, 1919, 9 & 10 Geo. V. ch. 13).

10. From the time in 1903 when the defendant corporation acquired the said line of street railway it continued to operate the same under the said by-laws Nos. 117 and 118 and certain other amending by-laws Nos. 179 and 259 until 1914, when, the period of franchise expiring under the said last mentioned by-laws, the plaintiff corporation, by its by-law No. 271, on the 14th day

of July, 1914, granted to the defendant corporation a franchise for the said line of railway for a period of 15 years from the 28th day of July, 1914, upon and subject to the terms of said by-law No. 271, and of an agreement dated the 23rd day of July, 1914, between the plaintiff corporation and the defendant corporation.

11. Under the provisions of the said by-law No. 271, from the date it became effective and up to the present time, the defendant corporation has continued to operate the said line of railway.

12. The plaintiff corporation has not at any time heretofore and up to the present time given to the defendant corporation any notice, statutory or otherwise, of intention to assume the ownership of the said line of railway or of the railway system belonging to the defendant corporation.

13. Prior to the 28th day of July, 1929, the plaintiff corporation notified the defendant corporation that on the said date it must discontinue operation of the said line of railway and remove its tracks.

14. Under the provisions of the Canadian National Railway Company Act, 1919, ch. 13 (and amendments), by order in council (Canada, P.C. 2443) of the 17th day of December, 1923, the corporate body known as Canadian National Electric Railways was created.

15. In addition to the said line of railway in the town of Merritton, the defendant corporation, by virtue of its powers under its Act of incorporation and amending Acts, owns and operates an interurban line of electric railway between the city of St. Catharines and the city of Niagara Falls, portion of which lies within the town of Merritton, but the same is constructed and operated upon a private right of way belonging to the defendant corporation, and not along or upon any street or highway in the town of Merritton, and such interurban railway is not a street railway.

Certain other facts were agreed to as facts, but their relevancy was disputed by counsel for the plaintiff. The documents relating thereto were filed and the facts agreed to subject to that objection. These facts relate to an amalgamation agreement between the Toronto Suburban Railway Company and the Toronto Eastern Railway Company, dated the 7th November, 1923, and the City of St. Catharines franchise agreement, and by-law No. 3635 of the City of St. Catharines, and the statute (1924) 14 Geo. V. ch. 119, being an Act respecting the City of St. Catharines. These three documents are all printed together (exhibit 12), and there is also

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filed an assignment from Canadian National Electric Railways to the defendant railway company, dated the 19th December, 1928, of all the privileges, franchises, and agreements provided for by the agreement incorporated in exhibit 12.

The question involved in the action turns largely upon the construction to be placed upon certain clauses of by-law 271 of the Village of Merritton, as it then was, which is the by-law granting the franchise, and which, with the agreement attached, dated the 23rd July, 1914, between the plaintiff and defendant, constitute together exhibit No. 1. By clause 17 of the by-law the rights and privileges thereby granted are to continue for the period of 15 years from the date of the coming into effect of the by-law, subject to the provisions and conditions therein set forth and contained being strictly performed and observed by the defendant company. The 15 years expired on the 23rd day of July last, and notice was duly given by the plaintiff to the defendant, exhibit 2, requiring the defendant to discontinue operations and remove its tracks and equipment. Paragraph 20 of by-law 271 has an important bearing upon the question. Its language is as follows:—

“All matters of dispute arising under this agreement may be referred by either party to the Ontario Railway Board, who shall hear all matters relating to an alleged violation of the terms of this agreement, and shall make such order as to it may seem just, as provided for under the Ontario Railway Act, 1913, the provisions of which said Act, in so far as they do not conflict with the terms of this agreement, form part of this agreement, and are binding on both parties hereto.”

The defendant contends that this clause, particularly the words “the provisions of which said Act,” incorporates into the agreement all the provisions of the Ontario Railway Act, 1913, 3 & 4 Geo. V. ch. 36, and that, inasmuch as, by sec. 246 of that statute, certain limitations are imposed upon municipalities desiring to put an end to street railway franchises, those limitations apply in this case, and, not having been complied with, the plaintiff fails to substantiate its contentions.

The plaintiff contends, on the contrary, that in the first place this railway, being of Dominion and not of Provincial origin, is subject only to the provisions of the Dominion Railway Act, and that in consequence the parties could not in this manner do what the Provincial Legislature itself could not do, namely, impose the burdens and obligations of the entire Railway Act of Ontario upon a railway declared to be a Dominion Railway.

Further it is contended by the plaintiff that, even if it is conceded that the parties could do this, yet the grammatical construction of the clause in question does not require an interpretation to be placed upon it involving the incorporation of the entire provisions of the Ontario Railway Act, and consequently sec. 246 thereof, but rather that the true interpretation limits the meaning to those sections of the Ontario Railway Act relating to disputes and providing for the submission thereof to the Ontario Railway Board, the subject-matter with which the clause in question was dealing, and in support of this contention counsel for the plaintiff points out that by clause 7 of the by-law certain specific clauses of sec. 259 of the Ontario Railway Act were expressly incorporated by reference to the letters of the alphabet designating the particular subsections as they appear in the statute, and the contention is that if by para. 20 of the by-law the whole Act was intended to be incorporated there could have been no possible object in referring to these particular subsections which would have been included in the general provisions of para. 20.

Dealing with the latter point first, that is the construction to be placed upon the words "the provisions of which said Act," I am of the opinion that the contention of the plaintiff is entitled to prevail, and that these words should be read and construed as though they were followed immediately by some such words as "relating to disputes."

My reasons for this conclusion are that para. 20 of by-law 271 purports to deal only with matters of dispute, and it is as to such matters only that the Ontario Railway Board is to be given jurisdiction. The Act is quite evidently being made to apply for the purpose of indicating what body shall deal with disputes and the nature generally of the orders it may be required to make in respect of them, namely, such orders as to it may seem just, as provided for under the Ontario Railway Act, 1913.

Further, I agree with the argument that if the entire Act was, by these few words, intended to be made applicable, it was unnecessary by clause 7 of the by-law to provide that certain specific clauses of sec. 259 of the Act should apply. The language of clause 7 indicates a deliberate selection and modification of certain subsections, and, to my mind, an exclusion of those not mentioned.

If this is the correct construction to be placed upon para. 20, it is perhaps scarcely necessary to deal with the larger question and inquire whether the parties could, by any language, do what the Ontario Legislature itself could not do, and, by agreement, in

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effect confer a provincial character and status upon what is admittedly a railway of Dominion origin. No doubt they could select and adopt verbatim into their agreement the language of the Ontario statute, in so far as it did not conflict with the Dominion Railway Act, or take away from the jurisdiction of the Railway Board of Canada, but further than that I think they could not go. And the parties to the agreement seem to have recognised this, because they have at various times submitted disputes which have arisen to the Railway Board of Canada, and that body has in so many words held that it alone had jurisdiction to deal with them.

Returning for the moment to para. 20 of the by-law, I may add that, assuming that the whole Act is intended to apply (and therefore sec. 246 as the defendant contends), that section cannot apply by the very terms of clause 20, if its language conflicts with the terms of the agreement. Section 246 of the statute of 1913 reads as follows:—

“246.—(1) No municipal council shall grant to a street railway company any privilege under this Act for a longer period than 25 years, and at the expiration of 25 years from the time of passing the first by-law which is acted upon conferring the right of laying rails upon any highway or at such other earlier date as may be fixed by agreement, the municipal corporation may, after giving to the company one year's notice prior to the expiration of the period limited, assume the ownership of the street railway, and all real and personal property in connection with the working thereof, on payment of the actual value thereof, to be determined by the Board.”

This section should be read in connection with clause 17 of the by-law, which is as follows: “The rights and privileges hereby granted shall continue for the period of 15 years from the date of the coming into effect of this by-law, subject to the provisions and conditions herein set forth and contained being strictly performed and observed by the said company.”

There is nothing in this clause nor anywhere else in the agreement or by-law imposing any obligation upon the municipality to assume the ownership of the railway at the end of the term, or, in default of so doing, be obliged to submit to the privileges of the railway under the agreement being indefinitely extended until such ownership is assumed; and, if sec. 246 of the Act is not in the strictest sense in conflict with clause 17 of the by-law, it would, at least, constitute such a radical modification of the terms of the agreement as to require the clearest possible language before its application could be admitted.

But Mr. Kingstone, on behalf of the defendant, contends further that, even assuming that sec. 246 of the Railway Act is not made applicable by the very language of the agreement itself, yet it must be held to apply for another reason, namely that that section constitutes an express statutory limitation upon the power of any municipality to contract with any railway company, either of Provincial or Dominion origin; and that, even had there been no reference whatever to the Ontario Railway Act in the agreement between the parties, yet the limitations imposed by this section must be held to apply.

No doubt a municipal corporation, being the creature of statute, is limited as to its contractual powers by the terms of the Municipal Act and of every other statute of the Legislature which purports to limit those powers, and this regardless of whether the other contracting party is a Dominion railway company or any other body or person.

But what counsel for the defendant in this argument is really seeking to establish is not that the Town of Merritton has undertaken to grant a franchise to the company in excess of its powers, but that the municipality can put an end to the franchise only by assuming ownership of the railway as provided in that section, and that, until that is done, then, in the language of subsec. (3), "the privileges of the company shall continue."

Subsection (5) of the section in question provides that the corporation (i.e., the municipal corporation) purchasing shall possess the same powers and authority and be subject to the same conditions, obligations and restrictions as the company, and shall be subject to all orders and directions of the Board—that is, of the Ontario Railway Board. That is to say, if the section applies, this railway of Dominion status, subject to the jurisdiction of the Railway Board of Canada, must either be taken over by the Municipality of Merritton and thereby become subject to the exclusive jurisdiction of the Ontario Railway and Municipal Board or its rights and privileges are to go on forever.

By its Act of incorporation, 62 & 63 Vict. ch. 77 (Canada), the defendant railway company was declared to be a work for the general advantage of Canada, and, by sec. 8, subsec. (2), all the provisions of the Railway Act of Canada were made to apply to it. The Board of Railway Commissioners for Canada, dealing with this same agreement and by-law, has held that the sections of the Ontario Railway Act dealing with remedies for breach of the agreement has no statutory application—that, at the most,

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what was provided for was a voluntary reference to the Ontario Railway Board. See Judgments of Railway Commissioners for Canada, vol. 15, at p. 87.

The railway then being one of Dominion and not provincial status, I am of the opinion that sec. 246 of the Ontario Railway Act has no application whatever in so far as it is sought thereby to impose an obligation on the part of the municipal corporation to assume the ownership of the railway or in default submit to the continued exercise of the railway's privileges notwithstanding the expiration of the term of the franchise granted to it.

A further and final argument on behalf of the defendant is the following: By an agreement (see exhibit 12), dated the 1st September, 1925, between Canadian National Electric Railways and the City of St. Catharines, in which it was recited that the railway company has offered to provide and operate the local lines as defined in the agreement (which expression, it is admitted, includes the line in question in this action) and to provide and operate a local passenger transportation system for the City of St. Catharines and its environs, the City of St. Catharines granted to the railway company the exclusive right to operate a passenger transportation system and for such purposes to use, occupy, and operate upon the streets referred to in section III. of the agreement, including certain so-called local lines which, as already mentioned, expressly include that of the defendant railway company. By the terms of the agreement, at the expiration of the franchise the city corporation agrees to purchase all and not less than all of the property specified in section XLV.

The making of this agreement was authorised by the City of St. Catharines Transportation System Act, 1924, 14 Geo. V. ch. 119 (Ont.), and the city was thereby authorised, subject to certain formalities, to enter into an agreement with Canadian National Electric Railways to grant to the said railway an exclusive right, franchise and privilege, to construct, use, own and operate a transportation system of local lines of electric railway or other means of transportation in the said city "and to and from the same," together with all railways or other works necessary or incidental thereto and with the right to use and occupy and to operate upon such streets "of the said city" as may be permitted under the agreement. By sec. 4 of this statute the City of St. Catharines is authorised to purchase the system under the terms of the said agreement, that is, at the termination of the franchise, and to own and operate the same notwithstanding that any portion thereof may be sit-

uate without the corporate limits of the city, "such operation to be carried on in accordance with the terms of any agreement respecting the same which may be entered into with the corporation of the municipality in which such portion is situate or failing any such agreement in accordance with such terms and conditions as may be prescribed by the Ontario Railway and Municipal Board."

The benefit of this agreement so authorised by the statute referred to has been assigned by Canadian National Electric Railways to the defendant, and the argument is, if I correctly understand it, that, by virtue of this agreement and statute. whatever rights the Town of Merritton may have had originally to put an end to the defendant's franchise over the streets of the plaintiff, those rights have either been lost entirely or are at least subject now to the terms of the agreement and statute referred to. In other words, because the defendant's assignor has entered into an agreement with the City of St. Catharines respecting, *inter alia*, certain railway lines upon streets in the Town of Merritton and has obtained from the City of St. Catharines a certain franchise, and because that city has been given the right to purchase the entire system at the expiration of the term of the franchise and to own and operate the same "notwithstanding that any portion thereof may be without the corporate limits," therefore the Town of Merritton, although no party to the agreement, is bound by it and by the statute authorising it, and its rights are subject thereto.

Undoubtedly if a private statute by plain, unambiguous and positive enactment, affects rights of parties who were not before Parliament when it was considered, it must nevertheless be given effect to: Halsbury's Laws of England, vol. 27, p. 183. But "it is never assumed that Parliament has given powers which would infringe existing rights even though the Act would be inoperative without them:" *ibid.* p. 184.

To my mind it is quite obvious that what Canadian National Electric Railways "offered to provide and operate," to use its own language in the first recital of the agreement, could only have been, in so far as Merritton is concerned, the unexpired term of the Merritton franchise, with such extended term as might be arranged with that municipality. It could never have been intended, and there is nothing in the agreement or the statute to suggest that it was intended, that the right of Merritton to exercise control over its own streets was being taken away. On the con-

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trary, there is language from which a contrary intention is to be gathered, because, by sec. 4 of the statute, it is expressly provided that in the event of purchase of the system by St. Catharines and its subsequent operation, such operation, as regards lines beyond the limits of St. Catharines, shall be carried on in accordance with an agreement to be entered into with the municipality in which those lines exist, or failing such agreement in accordance with terms to be imposed by the Railway Board.

It could scarcely be argued that, although the Legislature was careful to protect the rights of Merritton as regards possible future purchase and operation by St. Catharines, it failed entirely to preserve such rights of termination as it may have had in respect of the existing franchise.

For these reasons, the defences raised, in my opinion, fail, and the result is that, the franchise having come to an end by effluxion of time, the relief which the plaintiff asks for in clauses (1), (2), and (3) of the prayer in the statement of claim should be granted, but the injunction asked for restraining the defendant from carrying on its operations as well as the mandatory order for the removal of its tracks, etc., should not take effect until the 1st day of January, 1931. I make no direction as to damages in the meantime, but reserve to the plaintiff the right to ask for such should the operations of the defendant continue beyond the date mentioned.

The defendant should pay the plaintiff's costs throughout.

[IN CHAMBERS.]

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June 2.

RE ARROW RIVER AND TRIBUTARIES SLIDE AND BOOM CO. LTD.

Timber—Transmission upon Stream Forming Part of International Boundary—Right to Tolls for Use of Improvements Made by Timber Company—Lakes and Rivers Improvement Act, sec. 53—Fixing Tolls—Proceedings before District Court Judge—Jurisdiction—Motion for Prohibition—Constitutional Law—Act Found to be intra Vires—Ashburton Treaty—Construction and Effect of—"Free and Open"—Meaning of.

The A. company was incorporated under the Ontario Companies Act for the purposes of acquiring or constructing and maintaining any dam, slide, pier, boom or other work necessary to facilitate the transmission of timber down the Arrow river and its tributaries and that part of the Pigeon river which is within the Province of Ontario. Under the Lakes and Rivers Improvement Act, R.S.O. 1927, ch. 43, the A. company was, subject to the provisions of that Act, entitled to make improvements for the purpose of facilitating the floating of logs, etc., and to demand and receive lawful tolls upon all timber passing through or over the streams when thus improved—the tolls (sec. 53) to be fixed by the Judge of the District Court. The A. company applied to the Judge for a hearing to fix the tolls on the two rivers, and gave notice to interested parties of the day fixed by the Judge for a hearing. The Judge proceeded to hear evidence, but the P. company, one of those interested, moved for an order prohibiting him from hearing further evidence and from approving any schedule of tolls upon the Pigeon river, which is an international boundary:—

Held, that the case was not one in which an order of prohibition should be made: the contentions of the P. company, viz., that the Judge had no jurisdiction, inasmuch as the Pigeon river was not, at the point where the improvements were made, within Ontario, and therefore any adjudication made by him would be without jurisdiction, and that the provisions of the Ashburton Treaty precluded the levying of tolls on the Pigeon river, were properly to be dealt with as an answer to the claim of the A. company to collect tolls and did not go to the jurisdiction of the Judge to hear and dispose of that claim; it was not necessary for him to interpret the Lakes and Rivers Improvement Act or the Ashburton Treaty in order to give himself jurisdiction.

Re Township of Ameliasburg v. Pitcher (1906), 13 O.L.R. 417, followed.

2. The portion of Canada adjacent to the Pigeon river is part of the Province of Ontario: *The Canada (Ontario Boundary) Act*, 1889, 52 & 53 Vict. ch. 28 (Imp.)

The Pigeon river, though part of the international boundary, is not removed from the jurisdiction of the Province of Ontario; and the waters on the Canadian side are Canadian waters.

The Ship "D. C. Whitney v. St. Clair Navigation Co. (1907), 38 Can. S.C.R. 303, followed.

The bed of a navigable river is held by the Crown in the right of the Province: *Montreal City v. Montreal Harbour Commissioners*, [1926] A.C. 299.

The Lakes and Rivers Improvement Act does not purport to restrict or interfere with the navigation of the river, and cannot be regarded as invading the rights of the Dominion in its control over navigation: it is therefore *intra vires* the Ontario Legislature.

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Queddy River Driving Boom Co. v. Davidson (1883), 10 Can. S.C.R. 222, distinguished.

3. The Ashburton Treaty provides (art. 3) that certain water communications, including the Pigeon river, shall be *free and open* to the subjects and citizens of both countries; and it was contended that the A. company had therefore no right to impose tolls:—

Held, that the Ashburton Treaty, never having been validated by statute of the Imperial or Dominion Parliament, except as to certain clauses not here material, is no part of the law of this country.

In Canada or Great Britain a treaty does not confer, as between the State and the subject, or as between subjects, any rights upon the latter: under our constitution such rights can only be conferred by the common law of England or by legislative enactment of a duly competent legislature.

The question of the binding effect of a treaty upon the citizens of one of the high contracting parties discussed.

Rainy Lake and River Boom Corporation v. Rainy River Lumber Co. (1912), 27 O.L.R. 131, explained and distinguished.

Walker v. Baird, [1892] A.C. 491, and *Smith v. Ontario and Minnesota Power Co. Ltd.* (1918), 44 O.L.R. 43, referred to.

Held, also, that the words “free and open” do not mean “free of charges” or “without compensation,” but “available or accessible” only.

Benjamin v. Manistee River Improvement Co. (1880), 42 Mich. 628, and later American cases, approved.

MOTION on behalf of the Pigeon Timber Company Ltd. for an order prohibiting his Honour Judge McKay, the Junior Judge of the District Court of the District of Thunder Bay, from approving any schedule of tolls proposed to be charged by the Arrow River and Tributaries Slide and Boom Company Ltd. for alleged improvements made by it on the Pigeon river and from hearing any further evidence on the said application.

May 16. The motion was heard by WRIGHT, J., in Chambers.
H. F. Parkinson, K.C., for the applicant company.

Sir W. H. Hearst, K.C., for the respondent company.

Edward Bayly, K.C., for the Attorney-General for Ontario.

The Attorney-General for Canada was notified but did not appear.

JUNE 2. WRIGHT, J.:—The applicant is an incorporated company carrying on timbering operations in the neighbourhood of the Arrow and the Pigeon rivers. in this Province.

The respondent company was incorporated by letters patent under the Ontario Companies Act on the 7th day of September, 1922, for the following purposes and objects as declared in the letters patent, namely:—

“Subject to the provisions of the Timber Slide Companies Act, to acquire or construct and maintain any dam, slide, pier, boom or other work necessary to facilitate the transmission of timber

down the Arrow river and its tributaries and that part of the Pigeon river which is within the Province of Ontario and to blast rocks or bridge or remove shoals or other impediments or otherwise improve the navigation of the said Arrow river or its tributaries and the said Pigeon river, within the said Province of Ontario."

Under the Lakes and Rivers Improvement Act, R.S.O. 1927, ch. 43, the respondent company is, subject to the provisions of that Act, entitled to make improvements for the purpose of facilitating the floating of logs, etc., and to demand and receive lawful tolls upon all timber passing through or over such work. These tolls are, by sec. 53 of that Act, to be fixed by the Judge of the District Court after the applicant has taken certain preliminary steps to notify the interested parties.

The present respondent company, in alleged exercise of its powers in that behalf, gave notice, pursuant to sec. 53 of the Lakes and Rivers Improvement Act, of a hearing before his Honour Judge McKay for the purpose of fixing tolls on the Arrow river and a part of the Pigeon river.

His Honour proceeded to take evidence on the 14th April, 1930, with a view to fixing such tolls, and, after hearing certain evidence, adjourned the further hearing until the 2nd May of the present year, before which date the present motion was launched.

Upon the argument counsel for the applicant company admitted that, so far as the Arrow river was concerned, the District Court Judge had jurisdiction, and so the motion so far as that river is concerned need not be further considered.

The grounds urged in support of this application are:—

"1. That the said Judge has no jurisdiction to approve of tolls proposed to be charged by the said company for the use of alleged improvements made on said river by it for river driving purposes, such river being an international stream, and under the terms of the treaty between Great Britain and the United States, commonly known as the Ashburton Treaty, being free and open to the use of the subjects and citizens of both Canada and the United States.

"2. That Part V. of the Lakes and Rivers Improvement Act, in so far as it purports to authorise the said company to charge and collect tolls for the use of any improvements for river driving made or to be made in the said Pigeon river, is *ultra vires* the Ontario Legislature and null and void.

"3. That the said company has no legislative authority to exact tolls or other charges for the use of any improvements for river driving made or to be made by it in said Pigeon river."

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As the argument affects the respective rights of the Dominion and the Province of Ontario, the Attorneys-General for both the Province and the Dominion were notified, and the Deputy Attorney-General of Ontario appeared upon the argument, representing the Province, to uphold the validity of the Lakes and Rivers Improvement Act. The Attorney-General for Canada was not represented by counsel.

At the outset counsel for the respondent company contended that in any event it was not a case for prohibition, and in support of this contention he cited and relied upon the decisions in *Re Township of Ameliasburg v. Pitcher* (1906), 13 O.L.R. 411, and *Re Royston Park Subdivision and Town of Steelton* (1913), 28 O.L.R. 629.

Counsel for the applicant argued that the District Court Judge had no jurisdiction, inasmuch as the Pigeon river was not within Ontario, and therefore any adjudication made by him would be without jurisdiction, and that in any case the provisions of the Ashburton Treaty precluded the levying of tolls on the Pigeon river.

Counsel for the respondent company contended that it was not a case for prohibition, as the claim on behalf of the applicant was rather by way of defence to the claim of the respondent company to the right to charge any tolls, and did not affect the jurisdiction of the District Court Judge to hear and dispose of the application.

As stated in *Re Township of Ameliasburg v. Pitcher*, the contest is whether it is necessary to interpret the Lakes and Rivers Improvement Act or possibly the Ashburton Treaty in order to find out whether the District Court Judge should decide the rights of the parties at all. If he misinterprets the statute so as to give himself jurisdiction, prohibition will lie; but, if it be necessary to interpret the statute simply to decide the rights of the parties, prohibition will not lie, no matter how erroneous the judgment may be.

In my opinion, the allegations or contentions of the applicant are properly to be dealt with as a defence or answer to the claim of the respondent company to collect tolls and do not go to the jurisdiction of the District Court Judge to hear and dispose of the application. Upon such an application the present applicant would be entitled to adduce evidence to shew the cost of the improvements, and what was a fair schedule of tolls to be imposed, and other matters of a similar nature. It would also be open to the applicant to contend on such a hearing that under the Ash-

burton Treaty no tolls should be charged at all. But this view would not warrant or support the contention of the applicant that the District Court Judge had no jurisdiction to hear and dispose of the application. It would be analogous to a situation which would exist where the parties had agreed upon a schedule of tolls and the terms of the agreement were in dispute. In that case it would manifestly be within the jurisdiction of the District Court Judge to hear and dispose of the application, and, in arriving at a decision, construe the agreement and determine whether it was applicable or not.

As to the other contention, viz., that the Pigeon river, at the point where the improvements were constructed, was not within the Province of Ontario, it would require evidence, either documentary or oral, to establish the fact, and obviously it would be for the Judge hearing the application to decide on such evidence.

This would be sufficient to dispose of the application, as, in my view, it is not a case in which an order for prohibition should be made.

However, as there were other serious and substantial questions strenuously argued by counsel, with very great ability, I think it proper to refer to and dispose of the other grounds upon which the motion is based.

I shall first deal with the argument that part of the Lakes and Rivers Improvement Act is *ultra vires* of the Ontario Legislature, and therefore null and void.

It is true that the Pigeon river forms a part of the international boundary, but that does not remove it from the jurisdiction of the Province of Ontario.

By reference to the Imperial Act 52 & 53 Vict. ch. 28, entitled the Canada (Ontario Boundary) Act, 1889, it will be seen that this portion of Canada is designated as forming part of the Province of Ontario. Whether or not the Pigeon river is navigable does not enter into a consideration of the case.

In *The Ship "D.C. Whitney" v. St. Clair Navigation Co* (1907), 38 Can. S.C.R. 303, the Supreme Court of Canada asserted, apparently as undoubted law, that the waters on the Canadian side of the St. Clair river, even though forming part of the international boundary, were nevertheless Canadian waters.

The decision of the Judicial Committee of the Privy Council in *Montreal City v. Montreal Harbour Commissioners*, [1926] A.C. 299, appears to settle conclusively that the bed of a navigable river is held by the Crown in the right of the Province.

The Lakes and Rivers Improvement Act does not purport to

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restrict or interfere in any way with the navigation of the river, and I fail to see how it could be considered as trenching upon or invading the rights of the Dominion in its control over navigation.

There was no evidence before me that the Pigeon river was navigable at the point where the improvements were constructed, and upon a motion like the present I do not consider it proper to assume that the legislation was intended to affect matters beyond the jurisdiction of the enacting body, when it may apply to matters falling within the ambit of its powers.

The only case I have been able to discover dealing with this aspect is *Queddy River Driving Boom Co. v. Davidson* (1883), 10 Can. S.C.R. 222, where it was held that the Province of New Brunswick could not authorise the construction of a boom which would obstruct navigation in a river which was tidal and navigable. As I read this decision, it proceeded mainly on the ground that the river was a navigable one and therefore within the legislative jurisdiction of the Dominion.

In view of the decisions already cited and in the absence of authority to the contrary, I am of opinion that the legislation in question is *intra vires* of the Ontario Legislature.

The other argument urged by the counsel for the applicant is more serious. He contends that under the terms of the Ashburton Treaty, already referred to, the respondent company has no right to impose tolls, as it would contravene the provision of the Treaty which provides that the waters of the Pigeon river shall be free and open to the use of the subjects and citizens of both countries.

In art. 3 of the Ashburton Treaty the following provision appears:—

“It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods and also the Grand Portage from the shore of Lake Superior to the Pigeon river, as now actually used, shall be *free and open* to the use of the subjects and citizens of both countries.”

It may be mentioned here that by a subsequent treaty between Canada and the United States in 1925, the boundary-line between these two countries, or particularly that portion of it formed by the Pigeon river, was delimited.

In support of his contention counsel relies strongly upon the decision of the present Chief Justice of Ontario in *Rainy Lake and River Boom Corporation v. Rainy River Lumber Co.* (1912), 27 O.L.R. 131, and there are some dicta in that case which would

appear at first sight to warrant that contention, but a closer reading of the judgment in that case will disclose that the *ratio decidendi* did not include the point raised here. In that case the plaintiff company was incorporated under the laws of the State of Minnesota, and in the alleged exercise of its powers constructed a boom across the Rainy river to the Canadian shore. The defendant company was a Canadian corporation operating on the Canadian side of the Rainy river. The effect of the boom constructed by the plaintiff company was to divert the defendant company's logs to the United States side of the river, and under the alleged authority of the legislation of the State of Minnesota it attempted to impose and collect tolls for the logs belonging to the defendant company in the manner aforesaid. At p. 138, the learned trial Judge (Mulock, C.J.Ex.D.) is reported as holding that the plaintiff company illegally acquired possession of the logs belonging to the defendant company, and therefore was not entitled to payment for any services in respect of the logs thus wrongfully dealt with. He based his judgment also on another ground, namely, that the boom was in the river without legal authority. See p. 139.

At p. 141 the learned Chief Justice, in dealing with the scope of the Ashburton Treaty, makes use of the following language:—

“Under the Ashburton Treaty, the citizens of the two countries became entitled to the free use of the river. The Legislature of the State of Minnesota has purported to deprive them of that right by granting permission to the plaintiff company to exact tolls. The undisputed evidence is that the State Legislature had no jurisdiction so to repeal that clause in the Treaty.

“I, therefore, think that the provision in the plaintiff company's charter purporting to entitle it to impose tolls or other charges is *ultra vires* the State Legislature and null and void.”

The position in that case is entirely different from that existing in the present.

Under the law of the United States the Ashburton Treaty became and is a part of the law of that country: see Wheaton's International Law, 5th ed., p. 367. No State Legislature has any right to enact any statute that contravenes the provision of the treaty, which is, as already stated, deemed to be part of the law of the United States. See *Minnesota Canal and Power Co. v. Pratt* (1907), 101 Minn. 197.

In Canada or any other British country, the position is entirely different. A treaty is deemed a contract or convention between

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the two nations and does not become a part of the law of the land unless by express Act of the legislative body. It would appear that the Ashburton Treaty was never validated by statute of the Imperial Parliament or of the Dominion Parliament, except as to certain clauses relating to extradition of criminals, which was validated by an Imperial Act of Parliament.

The question of the binding effect of a treaty upon the citizens of one of the high contracting parties is dealt with to some extent in *Walker v. Baird*, [1892] A.C. 491. The actual decision in that case is rather limited in its scope, as the Judicial Committee based its decision entirely on the ground that the allegations contained in the statement of defence, namely, that the action of the defendant was an act of state and therefore justified his invasion of the legal private rights of the plaintiff, did not constitute a defence to the action. Their Lordships expressly declined to consider the effect of a treaty of peace or the case of a treaty akin to a treaty of peace or where in both or either of these cases interference with private rights can be authorised otherwise than by the Legislature. The argument before the Judicial Committee is informing and instructive.

At p. 492 it is stated that counsel for the appellant conceded that treaties involving questions of taxation or torts or cession of territory in time of peace could not be carried out by the Executive, but inferentially must be carried out by the Legislature. At that page it is further stated that the Crown did not contend that it could sanction an invasion by its officers of private rights in order to carry out any kind of treaty, or that the Crown had any power to enforce a treaty except when such treaty is to put an end to war or to prevent war. The contention of the counsel for the plaintiff in that case was stated to be that an Act of Parliament was necessary in order to make the provisions of a treaty of binding force upon private individuals and private rights. In many instances, as would appear by reference to Hertslet's General Index, Acts of Parliament were passed in order to carry out and enforce treaties.

In Oppenheim's International Law, 4th ed., pp. 733 *et seq.*, it is stated that the binding force of a treaty concerns the contracting States only, and not their subjects. It is there further stated that if treaties contain stipulations with regard to rights and duties of the subjects of the contracting States, these States must take such steps as are necessary, according to their municipal law, to make these stipulations binding upon their subjects.

The author suggests that in some countries special statutes

are necessary to make treaties binding upon the subjects of one of the contracting States.

At pp. 700 *et seq.* the question as to the binding force of a treaty is discussed, and it is stated that international law is less enforceable than municipal law. In fact there does not appear to be any tribunal up to the present date to enforce the observance of treaties. Heretofore they have been regarded as contracts dependent upon the honour of the contracting nations to observe the provisions.

In *Rainy Lake River Boom Corporation v. Rainy River Lumber Co.*, it will be noted that, except by inference, the learned Chief Justice did not hold that the imposition of a toll deprived a river of its free character, although such an inference might be drawn from some of the dicta used in that case.

Another case in our Courts which touches the question at issue is *Smith v. Ontario and Minnesota Power Co. Ltd.* (1918), 44 O.L.R. 43, where the effect of a treaty upon the citizens of the contracting countries is to some extent discussed. In that case the plaintiff sued the defendant company for damages for flooding his lands by the erection of a boom in the Rainy river, which forms at the point in question part of the international boundary between the United States and Canada. In that case it was stated by Mr. Justice Riddell, at p. 48, that at the time of the Ashburton Treaty "the water communications from Lake Superior to the Lake of the Woods and further west were used by fur-traders for the passage of goods, rum, etc., inward and furs outward . . . for the advantage of traders of either nation to be allowed to use the waters of the other," etc. "It must be obvious that the whole object of this clause" (referring to the Treaty) "is the advantage of those desiring to pass along the waters (and) or the portage: the provision is that such passage shall be free and open. There was no intention to take care of the rights of landowners or others near the route; and I do not think that such persons can appeal to the Treaty as it is sought to do here."

This case is helpful in shewing that the treaty is to be read and construed as applying to the situation at the time the treaty was negotiated, and that only those within the contemplation of the terms of the treaty can avail themselves of its provisions.

Read in this light. I think the proper construction to be placed upon the treaty is that it was a contract between the United States and Great Britain providing that in the navigation of this international water the citizens of each country should have equality

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of treatment and freedom of access, and that it was entirely in the nature of a contract between these two nations, and could not by any means be said to be legislation, at least on the part of Great Britain, respecting the rights of its subjects. In other words, it was never intended to enact and declare as law that the citizens of Canada should have access or right of navigation over the portion of the river under Canadian jurisdiction free from tolls or other regulations imposed by the legislation of their own Parliament.

This view of the matter would be sufficient to dispose of this application, but another argument has been urged with great force by counsel for the respondent company, to the effect that, assuming the provisions of the Ashburton Treaty to have the force of law in Canada, the proper construction of the treaty does not exclude the right of either of the countries to impose and exact tolls for the use of improvements constructed on the river by those legally authorised to do so.

It is contended that the expression in the treaty that these water communications shall be *free and open* to the use of the subjects and citizens of both countries only means that the citizens of each country shall have the right to use the water communication of the other without any obstruction or denial of their right to do so—in other words the term *free and open* does not mean free of charges or without compensation, but available or accessible only.

In our own Courts the expression “free and open” does not appear to have been the subject of judicial decision, but there are two cases in the United States Courts which touch the question, and, although these decisions are not binding, yet, as the reasoning in the judgments commends itself to me, I shall refer to them.

One of these cases is *Benjamin v. Manistee River Improvement Co.* (1880), 42 Mich. 628. In that case it was held that the navigable waters of the United States, though forever free, are nevertheless subject to state control and regulation and may be improved by bridge or dam under state legislation; further, that free navigation is not necessarily the unobstructed navigation of a stream in its natural condition. It was also held that tolls for the navigation of an improved stream are not taxes, duties, or imposts on the use of the stream, but rather tolls for the enjoyment of improvements by which it has acquired a new value and increased navigability.

In *Osborne v. Knife Falls Boom Co.* (1884), 21 N.W. Repr.

104, it was held that the Act of the Legislature authorising the defendant company to construct and maintain booms in the river and to receive and collect boomage on the logs handled by it was valid and did not violate the state constitution, which provides that the rivers of the United States should be forever free.

The case of *Benjamin v. Manistee River Improvement Co.*, already referred to, was followed in the *Osborne* case, and several other cases were cited in support of the doctrine that the tolls were really tolls charged on account of improvements and did not infringe upon the freedom of the river.

In the case of *Minnesota Canal and Power Co. v. Pratt* (1907), 101 Minn. 197, the effect of the Ashburton Treaty is considered in great detail. That case is of some value in that it states that the effect of a treaty entered into by the United States is to constitute it a municipal law binding upon the Courts, as well as an international contract. The decision in the case turned on the fact that the State Legislature had purported to grant to a public service corporation the right to exercise power of eminent domain in furtherance of its enterprise involving an interference with navigable waters in the State without having first procured the approval of its plan by the officers of the Federal Government. At p. 231, the obligation of the United States in respect to a treaty is stated and appears to be in harmony with the views of the text-writers on the subject, to the effect that for the breach of a treaty a nation is responsible only to the other contracting power in its own sense of right and justice and the public opinion of the world. Its treaty obligations are not cognizable ordinarily in any court of justice deriving its authority from municipal law.

The views of the text-writers on the subject of treaties and international law, as well as the cases referred to by counsel, have led me to the conclusion that in Canada or in Great Britain a treaty does not confer, as between the State and the subject, or as between subjects, any rights upon the latter, and that under our constitution such rights can only be conferred by the common law of England or by legislative enactment of a duly competent legislature.

Applying that principle to the present case, it would appear that the Ashburton Treaty does not and was not intended to confer upon a citizen of Canada any right or authority as against the Government of Canada or against any other citizen of Canada.

This disposes of all the questions raised on the argument, and, in view of the conclusions I have reached, it follows that the applic-

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SLIDE AND
BOOM CO.
LTD.

Wright, J. ation for prohibition must be dismissed on all the grounds taken
1930. by the respondent company.

The application will be dismissed with costs.

RE ARROW
RIVER AND
TRIBUTARIES
SLIDE AND
BOOM CO.
LTD.

[McEVOY, J.]

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HUNTER V. HUNTER.

June 17. *Dead Body—Right to Dispose of—Duty of Executor—Claim of Widow*
 —Change of Religious Faith in Last Illness—Mental Competence
 —Evidence—Conflict—Injunction

An aged man had been all his life a devout Protestant, but his wife was a devout Roman Catholic. During his last illness, and shortly before his death, he expressed a desire to be buried in the place where his wife would be buried, which was taken to mean in a Roman Catholic cemetery. He was baptized by a Roman Catholic priest and received into the Roman Catholic Church on the 30th April, and died on the 19th May, 1930. There was conflicting evidence as to his mental condition on the 30th April, and there was a contest between members of his family as to where he should be buried. One of his sons was named as executor in his will, and letters probate were granted to him by the proper Court:—

Held, that the executor had a right to the body for the purpose of burial; and, in an action brought by the executor against the widow and others, an interim injunction was granted and continued until the trial of the action, restraining the defendants from preventing the plaintiff from carrying out the burial of the body of the deceased.

Review of the authorities.

AN action by W. J. Hunter, executor of the will of Robert Hunter, deceased, against Mary Ann Hunter, E. H. Graham, and M. J. Keys, to restrain the defendants from interfering with or preventing the plaintiff from carrying out the burial of the body of the deceased.

An interim injunction was granted by the Local Judge at Kingston, and the plaintiff now moved for an order continuing it until the trial.

June 15. The motion was heard by McEvoy, J., in the Weekly Court, Toronto.

A. B. Cunningham, K.C., for the plaintiff.

Gideon Grant, K.C., and *J. M. Hickey*, for the defendants.

June 17. McEVOY, J.:—This is a motion made on behalf of a son of the testator Robert Hunter, who is the executor of the last will and testament of the deceased, for an order continuing an

interim injunction granted by the Local Judge of this Court at Kingston, restraining the defendants, their servants and agents, from interfering with or preventing the plaintiff from carrying out the burial of Robert Hunter's body. Robert Hunter departed this life on or about the 19th day of May, 1930. He made his last will and testament bearing date the 6th day of October, 1921, and named W. J. Hunter and George A. MacDonald executors, and probate of this will was granted to the plaintiff a few days ago, MacDonald having predeceased the testator.

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This is one of those unfortunate cases where honest sentiment and honest religious conviction have brought about an intensely sad struggle between two factions of a family. The deceased Robert Hunter was for his lifetime a staunch, devout Protestant and an Orangeman. His wife, the defendant Mary Ann Hunter, was and is an equally staunch and devout Roman Catholic. Each side, one would like to think (making due allowance for strong personal preference on each side), is inspired with a desire to see to it that the deceased shall be buried in the manner and in the place that he would desire to be buried in if he were to decide the matter, and were he so to decide it while he was in the full vigour of his faculties.

The matter now, however, is in the Court, and it is the duty of the Court to thread out the tangled skein and decide between the parties as best can be done under the law and upon the material filed so far as this motion is concerned. The dead must be buried.

I must first try to find the facts in so far as they are disclosed upon the material filed.

Robert Norman Hunter, a grandson, says that the deceased received the Sacrament from an Anglican priest in October, 1929; that the deceased exacted a promise from that priest, the Reverend Mr. Burke, that he (Burke) would see to it that he (Robert Hunter) should be buried as a member of the Anglican Church. He says that his (the affiant's) father and mother were present, and his uncle Edward Hunter and Edward Hunter's son were also present at this time—seven persons in all, including the testator. This affidavit was sworn on the 28th May, 1930.

Ethel Hunter, the wife of the plaintiff, swears that in the month of October, 1929, she was present at Edward Graham's house and in the room with the deceased and in the presence of her husband, William James Hunter, her son, Robert Norman Hunter, her brother-in-law, Edward Hunter, and his son Harold Hunter (seven in all, including the testator), when this promise

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1930. was sworn on the 28th May, 1930.

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William James Hunter, the plaintiff, swears that he was present at the house of Edward Graham in the month of October, 1929, and that he heard the deceased exact from the Rev. Mr. Burke the promise that he would see to it that the deceased should be buried as a member of the Church of England. He says too that the Sacrament was administered to those present by the Anglican priest, enumerating seven persons in all. This affidavit was sworn on the 28th May, 1930.

This Anglican priest, Robert R. Burke, swears that in the month of October, 1929, "the deceased asked me" (this Anglican priest) "to bury him." This affidavit was sworn two days later, on the 30th May, 1930. and the admission of service does not shew when it was served upon the solicitors for the defendants.

Edwin Hunter, a son of the testator, swears that he was present at the home of Edward Graham about the middle of October, 1929, when the Rev. Mr. Burke visited the testator and administered the Sacrament in the presence of the brother William Hunter, the wife of William Hunter, their son, and the son of the said Edwin Hunter, the same seven in all, and that the testator "did not discuss his burial place at that time in my presence till after the Rev. Mr. Burke left the house, and I did not hear the Rev. Mr. Burke promise that he would see that my father was buried as a member of the Church of England nor did I hear my father ask him to make any such promise. . . . My father did not mention his death or burial, nor did the Rev. Mr. Burke mention his death or burial to my father, but the Rev. Mr. Burke did say if my father's illness became worse during the night he would come back. His words, as I remember them now, were, 'Don't be afraid to send for me if you need me.'"

This is all the material filed in reference to the happenings at the house of Edward Graham at the time in October, 1929, when the Anglican priest administered the Sacrament to the testator. Of the six persons now alive who are sworn to have been present on that occasion five have made affidavits as above indicated. Four of these affiants depose affirmatively to facts; one, namely, Edwin Hunter, deposes negatively and partly qualifies his negations by saying "in my presence;" and in the fourth paragraph of his affidavit says, "My father did not mention his death or burial."

In this state of the material, I must conclude that upon the occasion in October, 1929, the testator did request and the Angli-

can priest did agree that the testator should be buried as an Anglican. The Court, according to our law, gives greater weight to affirmative statements than it does to negative statements of the kind made upon the material here.

Other dates of importance upon the material filed are the 29th and the 30th April, 1930.

The Rev. Daniel A. Casey, Roman Catholic priest, swears that on Tuesday the 29th April, 1930, Mary Ann Hunter, the widow of the testator, telephoned him "that her husband was ill and asking me to go and see *her*;" that, knowing her husband was a Protestant, he hesitated, but upon receiving a second call from Mary Ann Hunter, "I decided to go."

"I arrived at the Graham house about 5 o'clock in the evening . . . talked with Mary Ann Hunter, went in and spoke to Robert Hunter, but did not discuss religion with him, and changing his faith was not mentioned nor discussed.

"On Wednesday following I again called to see Mrs. Hunter, as a result of a further telephone message from her . . . and was accompanied by Father O'Hanlon, of Ernestville, who happened to be visiting me at that time.

"We spent some time with Mrs. Hunter and saw Robert Hunter, and I stepped out of the room while Father O'Hanlon was talking to him. Father O'Hanlon came from the room and told me that Robert Hunter had said to him that he wanted to be the same as his wife, and he understood by that he meant to become a Roman Catholic.

"I returned to the room with Father O'Hanlon and we talked the matter over with Robert Hunter and he appeared to understand what he was doing and said he wanted to be the same as his wife. I explained to him that I had not come prepared to receive him into the Church and that certain ritual articles and other incidentals would be necessary."

He says he went to his own place with Father O'Hanlon and returned with the necessary articles "and received the said Robert Hunter into the Church."

"That he talked to us and we explained to him what we were doing and he appeared to understand and I firmly believe that he did understand."

The Rev. Father O'Hanlon makes no affidavit, although he is the first person to whom Robert Hunter appears to have spoken about changing his faith, so far as the material shews.

The Rev. Father Casey further swears that on the 3rd May the plaintiff came to him and seemed upset about Robert Hunter's

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McEvoy, J. having changed his faith; that the plaintiff "said his father was
1930. not of sound mind and that he had him examined by two doctors,
who declared he was incapable of managing himself or his affairs."

HUNTER. Father Casey swears, too, that he told the plaintiff that "if
v. HUNTER. his father was not of sound mind when received into the Church
I would have nothing more to do with it . . . I then asked him
what he wished me to do and he said he had two requests: the
first, that I should go to the Grahams and ask them to admit the
Rev. Mr. Cook and himself; and, secondly, that if his father should
die I promise not to bury him from the Catholic Church. I
promised both."

Father Casey also swears that on the 5th May he went to the
Graham house to make the request that the plaintiff and the Rev.
Mr. Cook be admitted to see Robert Hunter; that Mary Ann Hun-
ter refused to allow the interview and gave as her reason that
Robert Hunter had "asked her not to allow any person to bother
him."

On this occasion, Father Casey swears, he interviewed Robert
Hunter and found him as described in his letter to William Hun-
ter, the plaintiff, dated the 5th May; and he further swears that
on that interview "I decided . . . that William Hunter's state-
ment that his father was of unsound mind and incapable of manag-
ing himself and his affairs was not correct, and I confirmed the
opinion formed when we received the said Robert Hunter into the
Church, that his mind was sufficiently clear to enable him to
understand what he was doing.

"After confirming my opinion, I asked Mary Ann Hunter to
allow the Rev. Mr. Cook to see Robert Hunter," and that he re-
ceived the answer already indicated.

The material parts of the letter of the 5th May, speaking of
Robert Hunter, are: "I found him bright and cheerful, and in
possession of his full faculties. I asked him was he quite satisfied
to be a Catholic, and he said 'Yes.'"

"I asked him, were he not a Catholic, would he wish to be one.
He answered 'I am glad I did what I did.' I asked him 'If you
had not been baptized the other day, would you have me do so
now?' He answered 'Yes.' He added that he did not want any
one coming and bothering him about what he did."

Of Robert Hunter's condition on this same 29th day of April,
1930, John de Lendrecies Campbell, a physician, swears: "I was
called to attend the above named Robert Hunter . . . I . . .
found that he had just had a slight paralytic stroke. He was
thick of speech and his mind seemed to be distinctly impaired;"

that on the second day following, "in company with Dr. J. G. McEvoy, J. Bogart, I saw the said Robert J. Hunter again. I found that by reason of his age and disease his mind was affected and that his power of resistance was appreciably weakened, and that his memory appeared to be gone. He answered questions in a parrot-like manner and could not remember what had occurred the day before. I am decidedly of the opinion that the said Robert Hunter is of unsound mind and wholly incapable of the management of his affairs or the care of his property."

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This affidavit was sworn and filed on the 12th May, 1930, upon an application in lunacy on the 19th May, 1930, and was used upon this application.

On the same day Dr. Bogart made an affidavit. He swears he examined Robert Hunter with Dr. Campbell on the 1st May, 1930.

"I was called for the purpose of examining him (Robert Hunter) in regard to his mental capacity. I found that he had a stroke two days previously.

"That I did examine the said Robert Hunter, and from my examination I am of the decided opinion that the said Robert Hunter was of unsound mind and wholly incapable of the management of himself or his affairs or the care of his property . . . I found extreme defects of memory and lack of understanding and a lack of all power of continued attention. I found that the said Robert Hunter could not remember anything that occurred two days before, although I was informed that he had the day before been baptized into the Roman Catholic Church."

Another affidavit is filed. It is sworn on the 15th May, 1930. In this affidavit Emma Graham swears that she is a daughter of Robert Hunter, and that she has "always cared for him throughout his illness with rheumatism and have been in constant attendance . . . his mind has always been clear and is to-day and he is fully able to understand and appreciate the consequences of his acts."

Another affidavit is filed, also sworn on the 15th May, 1930. In it Edward H. Graham swears that he is a son-in-law of Robert Hunter; "that on or about the 29th April last he was taken ill; that, although weakened by his illness, his mind did not change, and I had frequent conversations with him on Tuesday, Wednesday, and Thursday, the 29th and 30th April and the 1st May, and he was as rational as at any time since I first saw him and has continued so, and is to-day . . . I have discussed his change of religion with him every day since that time and he fully ap-

McEvoy, J. appreciates the nature and consequence of his act in so doing and has told me so many times and asked me not to let his son William bother him. . . .

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"When Dr. J. G. Bogart examined the said Robert Hunter he said to him, 'Mr. Hunter, if you were calling for a clergyman, what clergyman would you call for?' and my father-in-law answered 'Priest Casey' and repeated it."

Mary Ann Hunter also makes an affidavit sworn on the 15th May, 1930. She swears that on the Wednesday evening, when the two priests received her husband into the Roman Catholic Church, "I was present when he was baptized and he talked with Father Casey and Father O'Hanlon and he knew and fully appreciated what he was doing; that I have been with him constantly since that time and he has confirmed his action, and his mind then since that time and to-day is just as clear as it was prior to the 29th April, 1930, and as it was for some years."

Edward Hunter, a forty-four year old son of Robert Hunter, also makes an affidavit and swears he was notified of his father's illness by his sister Emma Graham on Wednesday evening the 30th April, 1930, about 8 o'clock; that "I immediately went to see my father, arriving about 9, and I remained with him until after 12 o'clock. When I reached his bed-side he knew me, spoke to me and shook hands with me . . . When I was leaving he said to me: 'I will be all right. Go on home. The boy has to get up early in the morning.'"

This boy was the affiant's son and works on the railroad.

Edward Hunter continues: "I saw my father again on Thursday morning about 10 o'clock and he talked with me about seeding. He asked me where I was going to buy my grain, how many bushels I needed and how many I had sown. I said to him: 'It is a funny thing that you waited until now to change your church.' He answered: 'I know what I have done and I do not want to be bothered.' He also said, 'If I get any worse they will send you word.' . . . Apart from my father being weak, his condition seemed to me to be the same as always and his mind appeared to be clear and his conversation with me was quite sensible. He knew what he had done with regard to being received into the Roman Catholic Church, and it appeared to comfort him to know that he would be buried with my mother, and he said to me, 'I want to be buried alongside your mother. It is all I can do for her and Emma now.'"

William James Hunter (the plaintiff) in an affidavit sworn on the 12th May, 1930, speaks of a slight stroke in October, 1929,

and says he visited him, Robert Hunter, four or five times between that time and the 29th April, 1930, "on which date my father had a serious stroke of paralysis which left him very much enfeebled in mind . . . I at once visited him and I found him quite enfeebled in mind and unable to answer the simplest questions. I learned . . . that the Rev. Father Casey . . . had been called in by my mother . . . that Father Casey and another Catholic priest had baptized my father into the Roman Catholic Church and had administered to him the last rites of the Roman Catholic Church. On the 3rd May I called on Father Casey, who expressed regret for what he had done, and stated to me that my father was not capable at that time and that he would visit my father no more, and that my father would not be buried by Father Casey's church;" and he makes the letter of Father Casey an exhibit. He swears he was present on the 1st May, 1930, with Doctors Campbell and Bogart when they examined his father, and that they "declared to me that my father was utterly incapable of understanding or answering simple questions; that on the 2nd May I attended on my father, accompanied by the Rev. A. O. Cook, rector of the Church of England . . . and we were refused admission by my mother and sister; that again on the 6th May I attended with the Rev. A. O. Cook . . . I was again refused admission by my mother and my sister . . . ; that my father was all his life a Protestant, Master of an Orange Lodge, and until the last paralytic stroke was a staunch member of the Church of England; that since the last stroke my father has been lying helpless both in mind and body at the home of my sister . . . and neither I nor his spiritual adviser has been permitted to have access to him."

In so far as the lay evidence spread upon these affidavits is matter of opinion as to the mental condition of Robert Hunter, I am of opinion that it is not of probative value; but, in so far as that evidence relates to facts and circumstances from which the Court may draw inferences, it is valuable and receivable.

Walter J. Connell, Doctor of Medicine, and in charge of the Department of Medicine and Clinical Medicine at Queen's University, makes an affidavit sworn on the 15th May. He swears that he examined Robert Hunter on the 13th May; that he is "an aged man suffering from the joints of both arms and legs being crippled by rheumatoid arthritis. He is slowed up mentally and expresses himself slowly, finding difficulty in recalling the proper word at times, but he corrects at once any statements at variance with his ideas. He talks freely about the 'farm he

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McEvoy, J. used to occupy' . . . told of the number of cows milked, and the factory to which he sent milk; the number of horses and pigs kept, and of selling extra grain at Richardson's elevator. He said he had been living with his daughter Emma Graham for the past two years, and that he was well looked after. He said when he died he wished to be buried in a graveyard alongside his wife, and that this meant being a Roman Catholic. There is no doubt in my mind but that, with his slower mental processes, he is amenable to suggestion of those about him in whom he has confidence, but in the course of my conversation with him he appeared to me to have weighed the matter of his change of religious faith and decided to make the change for reasons that appeared to him to be sufficient, and which seemed to give him a great deal of satisfaction . . . I am of opinion that his mind is sufficiently clear to enable him to know and appreciate the consequence of his acts."

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Philip H. Huyck, Doctor of Medicine, practising in Kingston for five or six years up to the autumn of 1929, in an affidavit made on the 15th May, 1930, swears that he examined Robert Hunter on the 13th May, 1930. He swears: "I found no evidence of his having had a stroke. His blood pressure was 140 M.M. on the 13th day of May, and there was no evidence of paralysis in either of his arms or legs . . . There is evidence of senility but no evidence of lunacy. His memory is not good respecting recent events, but he can remember distinctly events of 40 years ago . . . I visited him on two or three occasions during the early fall of last year and found him mentally quite bright . . . took his blood pressure on the occasion of one of those visits and found it quite normal . . . not at all likely to cause a stroke. I questioned him carefully to determine his mental capacity, and in my opinion his mind to-day is sufficiently clear to enable him to understand and appreciate what he is doing, and he expressed to me his desire to be buried beside his wife when he died, and stated that for this reason, and also to please his daughter Emma Graham, he had embraced the faith of the Roman Catholic Church."

Margaret Ahern, Emma Graham, and Edwin Hunter severally swear on the 26th May, after Robert Hunter's death, that they are children of Robert Hunter and his wife, and that after the 30th April and until his death he expressed his desire "to be buried with our mother," and that they severally support the mother in her effort to secure the custody of Robert Hunter's body.

The law as to who has the right to the possession of a dead body for the purposes of burial, as distinguished from the question

of upon whom a duty of burial devolves, may not be entirely well-settled. Halsbury says, *Laws of England*, vol. 3, p. 405:—

“The law as to the persons upon whom the duty of disposing of a dead body falls, and as to the nature of that duty, is imperfectly developed.”

It is there said also that there is authority for the propositions: (a) that the duty is incumbent upon the executor; (b) on the husband of a deceased wife; (c) on the parent of a deceased child; and (d) on any householder on whose premises the body lies.

It is urged by Mr. Grant that the authorities stop there, particularly as to the executor; that the right of the widow to the possession of the body of her dead husband for the purposes of burial is paramount, or at least that it is greater than that of the executor, and that it ought to be held to override the right of the executor.

In the case at bar the widow and three children in effect claim the body for the purpose of burial as against the claim of the executor, who is a fourth child. Upon the material it seems reasonably clear that Robert Hunter before his fatal illness, commencing on the 29th April and ending in death upon the 18th May, 1930, had no intention of being buried elsewhere than at “the place of his fathers,” namely, Sand Hill Cemetery, a Protestant cemetery. The affidavits are painfully contradictory as to his mental condition after that illness commenced. I am impressed, however, with the submission that he was far from being his full normal self mentally after the 29th April. He was under the control, ever after that date, of those who seek to justify and use the acts which they say are his acts and on which acts they rely to warrant them in claiming his body.

If the principles upon which the Court proceeds in determining whether the acts in the making of a will are the testator’s acts were to be applied to determine whether these acts now relied upon were his acts in law, the onus would be upon the widow “to justify the righteousness of the whole transaction.” She, the widow, sent for the priest, she refused the son and the other spiritual adviser, Cook, admission. Her husband was under her control. There is not any history of any expressed intention to change his faith before his fatal illness, though there is some evidence of some expression of a desire to be buried beside his wife of earlier date than the 30th April, and I think the Court ought to take it as necessary, in order to accomplish that object, to make a change of faith. On the other hand, it would appear

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McEvoy, J. that the movement to have the mental condition of Robert Hunter
1930. inquired into was not brought into action until after the acts were
done which are said to have been his acts and are claimed to be
HUNTER acts which evidenced his change of faith, and *ergo* change of
v. burial-place. So far as possible, a desire on his part, under all the
HUNTER. conditions, ought to be considered.

A husband is liable to pay for his wife's funeral even when the burial is directed in his absence and without his knowledge or assent. It is the husband's legal duty, if financially able, to bury his wife in a manner in keeping with her station: *Jenkins v. Tucker* (1788), 1 H. Bl. 90.

In 1829 it was held by Garrow, B., Hullock, B., and Vaughan, B., in *Rogers v. Price*, 3 Y. & J. 27, that an executor who has assets sufficient for the purpose is liable upon an implied promise to pay for a suitable funeral even when furnished upon the direction of a third person.

In *Sharpe's Case* (1857), 1 Dears. & B., Pollock, C.B., Erle, J., Willis, J., Bramwell, B., and Watson, J., when considering this reserved case, say (p. 163): "Neither does our law recognise the right of any one child to the corpse of its parent as claimed by the defendant."

It has been repeatedly held that there can be no property in a dead body, but, where there has been a duty to bury, it has been held that there is a right of possession of the body for that purpose. In *Williams v. Williams* (1882), 20 Ch.D. 659, at p. 664, Kay, J., quotes with approval Williams on Executors, 6th ed., p. 906, where it is said: "It is now proposed to consider the duties of an executor or administrator" with respect to burial; "and first, he must bury the deceased in a manner suitable to the estate he leaves behind him." Kay, J., also says (p. 665): "A man cannot by will dispose of his dead body;" and he says: "It follows that the direction in this codicil to the executors to deliver over the body to Miss W., who is not one of his executors, is a direction which, in point of law, could not be enforced, and was void If the purpose had merely been for burial in a particular cemetery, which would be entirely according to the law of this country, that would not make the direction to deliver the body to some one who was not an executor any more legal or enforceable." See also 17 Corpus Juris, p. 1139. See, too, the judgment of Beck, J., in *Miner v. Canadian Pacific Railway Co.* (1910), 15 W.L.R. 162.

Applying the principles in these cases and the other cases to which I was referred, I am of the opinion that the executor has a right to have the body for the purpose of burial, and that the

injunction granted should be continued, upon the same conditions as to damages as imposed by the Local Judge, until the trial of this action.

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Order accordingly.

[APPELLATE DIVISION.]

SMYTHE V. CAMPBELL.

1930.
June 20.

Negligence—Motor-vehicle upon Highway—Excessive Speed—Vehicle Going into Ditch—Death of Driver—Injury to Passenger—Action against Executrix of Driver—Findings of Jury—Cause of Accident—Whether Passenger Volens — Corroboration of Passenger's Evidence—Evidence Act, R.S.O. 1927, ch. 107, sec. 11—Contributory Negligence of Passenger—Failure to Remonstrate in Regard to Speed.

C. drove his motor-car upon a highway, having the plaintiff seated beside him. In rounding at high speed a sharp left-hand curve, the car was carried by its momentum off the pavement. It ran over the gravelled shoulder of the road, hurdled a distance of 27 feet without touching the ground, and then ran more than 100 feet in and along the ditch before stopping. C. was killed and the plaintiff injured. In an action against the executrix of C., the jury found that the plaintiff's injury was caused by the negligence of C., consisting in "fast driving and exceeding the lawful speed-limit;" that the plaintiff was guilty of contributory negligence—"he should have checked up on the driver's speed;" that the entire amount of damages to which the plaintiff would have been entitled had there been no contributory negligence was \$1,800; that the degrees of negligence were C. 75 per cent., the plaintiff 25 per cent.; and that the plaintiff did not voluntarily assume the risk of the plaintiff's fast driving; and judgment was directed to be entered for the plaintiff for \$1,350 damages:—

Held, upon the defendant's appeal, that the principle *volenti non fit injuria* was not applicable; although the plaintiff was well aware from experience that C. was a fast driver, he also knew that C. had always driven him carefully, and had no reason to anticipate that fast driving on this occasion would result in an accident.

Per RIDDELL, J.A.:—Assuming that the speed was dangerous, and that the plaintiff knew it, and that, consequently, the plaintiff placed himself in a dangerous position, that is not enough—*sciens* is not *volens*.

Per MASTEN, J.A.:—The question whether the plaintiff was *volens* or not is wholly a question for the jury; and, there being evidence on which a jury of honest and reasonable men could find as this jury did, the Court could not interfere.

Held, also, that the corroboration required by sec. 11 of the Evidence Act was supplied by the evidence of one who visited the scene of the accident a few hours after it happened and measured the distance compassed by the car after it left the highway.

If the evidence adduced as corroboration is such as to induce the trial tribunal to believe the story of the survivor, it is sufficient, and there is no need of corroboration as to every circumstance relied on.

Held, also, that the finding of the jury that the negligence of C. was the cause of the plaintiff's injuries was warranted by the evidence.

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Held, upon the plaintiff's cross-appeal (MASTEN and FISHER, JJ.A., dissenting), that there was no evidence to sustain the finding of the jury that the plaintiff was guilty of negligence contributing to the injury; and (that finding being set aside) the plaintiff was entitled to recover the full amount of damages found by the jury.

What caused the excessive speed to become effective was the temporary negligence of C., which the plaintiff was not to be considered as expecting or to be liable for.

Gauley v. Canadian Pacific Railway Co. and *Birkett v. Canadian Pacific Railway Co.* (1930), *ante* 477, distinguished.

Per MASTEN, J.A.:—The question whether the plaintiff was guilty of contributory negligence was also a question of fact for the jury; and it was impossible to say that in neglecting to ask C. to moderate his speed the plaintiff was not guilty of omitting a precaution which a reasonable man would have taken for his own safety, or to say that a slower rate of speed would not have averted the disaster.

AN appeal by the defendant and a cross-appeal by the plaintiff from the judgment of LOGIE, J., after trial of the action with a jury, awarding the plaintiff \$1,350 damages against the defendant, the widow and executrix of the will of C. D. Campbell, deceased, the action being for injuries sustained by the plaintiff when a passenger in the deceased's motor-car by the car going off the road and overturning. Campbell was killed, and the plaintiff was injured. The jury found that the overturning of the car was due to fast driving by Campbell, and that there was contributory negligence on the part of the plaintiff in not "checking up on Campbell's speed."

May 23. The appeal and cross-appeal were heard by LATOUFF, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

T. J. Agar, K.C., for the defendant, argued that the plaintiff voluntarily assumed the risk of fast driving, and so the maxim *volenti non fit injuria* applied to the accident: *Gauley v. Canadian Pacific Railway Co.* (1930), *ante* 477. The plaintiff did not protest against the speed. He sat idly by and acquiesced in this breach of the speed-law, of which he must have known. His silence made him *volens*: *Blashfield's Encyclopædia of Automobile Law*, pp. 187, 1087; *Harding v. Jesse* (1296), 207 N.W. Repr. 706, 708; *Wagenbauer v. Schwinn* (1926), 131 Atl. Repr. 699; *Page v. Page* (1929), 227 N.W. Repr. 233; Annotation in 41 American L.R. Annotated, p. 767. There was no evidence to support the finding of the jury as to the negligence of the deceased driver.

R. L. Kellock, for the plaintiff, was not called upon to answer the argument for the defendant. On the question raised by the cross-appeal, he contended that the plaintiff was entitled to judgment for the full amount of damages claimed, \$1,800, as there was no evidence to support the jury's finding of contributory negligence on the part of the plaintiff. There was no duty cast upon the

plaintiff, in the circumstances, to warn the driver or to protest against the speed. The danger was not obvious to the plaintiff, he had no control over the driver, and consequently he was not guilty of any negligence: *Pike v. London General Omnibus Co.* (1891), 8 Times L.R. 164; *Hunter v. City of Saskatoon* (1919), 48 D.L.R. 68; *Reynolds v. Canadian Pacific Railway Co.*, [1927] S.C.R. 505; *Pratt v. Patrick*, [1924] 1 K.B. 488, at p. 493; *Little v. Hackett* (1886), 116 U.S. 366, at pp. 368 and 380; *Clayards v. Dethick* (1848), 12 Q.B. 439, at p. 445; *Foley v. Township of East Flamborough* (1899), 26 A.R. 43, at p. 47.

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Agar, K.C., in answer to the cross-appeal, contended that contributory negligence had been adequately proved, and referred to Huddy on Automobiles, 8th ed., pp. 990, 991; Berry on Automobiles, 5th ed., p. 483.

June 20. LATCHFORD, C.J.:—This appeal was from the judgment of Logie, J., of the 4th March, 1930, awarding the plaintiff \$1,350 damages upon the findings of a jury that in an automobile accident the plaintiff had sustained damages amounting to \$1,800 through the negligence of the late Charles Donald Campbell, of whom the defendant is the widow and executrix. Owing, however, to what they considered fault on the part of the plaintiff to the degree of 25 per cent., the damages were subject to the corresponding reduction: Contributory Negligence Act, R.S.O. 1927, ch. 103.

The accident out of which the action arose occurred on a provincial highway a little west of Napanee, after midnight, on the 21st May, 1929, while the plaintiff and Campbell were returning from a point farther east, where they had been on business. In rounding at high speed—50 to 60 miles an hour it is said — a “sharp” left-hand curve, the car driven by Campbell, with Smythe seated beside him, was carried by its momentum off the pavement. It ran over the gravelled shoulder of the road, hurdled a distance of 27 feet without touching the ground, and then ran more than 100 feet in and along the ditch before stopping. Campbell was killed and Smythe severely injured.

Without calling on Mr. Kellock, the Court was of opinion that the principle *volenti non fit injuria* did not apply in the circumstances, and that the plaintiff's evidence as to the cause of the accident was “corroborated by some other material evidence,” as is required by sec. 11 of the Evidence Act, R.S.O. 1927, ch. 107. Although Smythe was well aware from experience that Campbell was a fast driver, he also knew that Campbell had always driven him safely. He had no reason to anticipate that fast driving on

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the occasion in question would result in an accident, and therefore was not *volens* according to well-settled law.

The necessary corroboration was considered to have been furnished by the evidence of the provincial constable who visited the scene of the accident a few hours after it happened and measured the distance compassed by the automobile after leaving the highway. The speed at which Campbell was driving around the curve was undoubtedly excessive, negligent, and, as found, the cause of the plaintiff's injuries.

Accordingly, the main appeal was dismissed.

The cross-appeal presented greater difficulties and was reserved for further consideration. It is based on the ground that the only negligence attributed by the jury to the plaintiff was not a cause contributing to the accident, and that therefore the damages found should not be subject to reduction under the Contributory Negligence Act.

Negligence on the part of the plaintiff was not alleged in the statement of defence. Denying that there was any negligence whatever on the part of her husband, the defendant merely pleaded that the plaintiff was identified with any negligence that there may have been on the part of the deceased. Without objection, however, a question on the point was submitted to the jury, as follows: "Was the plaintiff guilty of any contributory negligence?" The jury answered "Yes." That negligence they then found was, "He should have checked up on the driver's speed." All other grounds of contributory negligence that might exist are thus negatived.

The degree of negligence of the driver and passenger were found to be: "Campbell 75 per cent., Smythe 25 per cent."

In answering question number 8, "Did Smythe voluntarily assume the risk of Campbell's fast driving on the occasion in question?" the jury stated, "Yes, as percentage." When the answers were read to his Lordship, Mr. Payne, as counsel for the plaintiff, objected to the finding on question No. 8, saying: "If it was the intention of the jury to find contributory negligence, and no *volens*, as your Lordship said to the jury—if that is what the jury meant—then I would suggest that question No. 8 should be answered 'No.'"

"His Lordship: Gentlemen, you have heard what counsel has said. You found contributory negligence, and that is all you did find. Do you agree that, under the circumstances, the answer to question No. 8 should be changed from 'Yes, as percentage,' to 'No?' You find that the plaintiff was not willing to assume the

risk so as to disentitle him to any damages at all. Are you willing to strike out that answer and say 'No' to the last question?

"A juror: I do not just understand the question yet.

"His Lordship: If you had found that the plaintiff had willingly undertaken the risk, with full knowledge of the risk, and all that sort of thing, he would not be entitled to anything. You have answered it, 'Yes, he did assume the risk,' but only as a percentage of his contributory negligence; and that is what you intended?

"The Foreman: Yes.

"His Lordship: I think it would be better to clarify the answer in case it goes higher. If you mean that the plaintiff did not assume the risk in the sense that he would not be entitled to get anything at all, it would be better to strike out that answer and answer question No. 8 'No.'

"The Foreman: Yes.

"His Lordship: So say you all? All the jury are agreed. The appellate Court will understand you did not mean he was to get nothing."

The final answer to the 8th question was fully warranted by the evidence. What then remains adverse to the plaintiff is, whether the finding that he "should have checked up" on Campbell's speed properly constitutes a finding of contributory negligence.

It is not easy to determine precisely what the jury meant by "checked up." Assuming it to be at the highest that the plaintiff, observant of the high speed at which Campbell was driving, should have objected to it and protested against it, I incline to the opinion that it falls short of a proper finding of contributory negligence in any degree. It can, I think, be taken to be a matter of common knowledge that the rapidity at which motor-vehicles now ordinarily proceed, while undoubtedly dangerous, is not so regarded by otherwise reasonable men and women who, driving or being driven, exultingly fly along our highways at speeds surpassing those of the fastest railway-trains. The results are often appallingly tragic, but that they are seldom anticipated is evident from the very frequency of their occurrence.

The prevailing desire for rapid transit, coupled with the notable optimism of motorists that it may be safely accomplished, must, in my opinion, be regarded when the question of Smythe's negligence, as found, is under consideration.

What I have said on the point of *volens* applies here. Smythe knew that Campbell was a fast driver, but also a careful driver; and did not apprehend that an accident would result from his driving at high speed.

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The circumstances were quite different in the recent cases of *Gauley v. Canadian Pacific Railway Co.* and *Birkett v. Canadian Pacific Railway Co.*, ante 477, as recently decided by this Court, differently constituted. There, obvious danger was confronting Miss Birkett as well as Gauley. Like the driver of the car, she was not under any disability preventing her from hearing and seeing the train approaching, in clear view, the familiar intersection which he was attempting to drive across at his and her peril of being injured by the locomotive, as in fact they were. She was, I thought, conscious of the great danger and risk assumed by the driver, and, not making the least objection or effort that would tend to prevent it, was as guilty as he was of the negligence which caused the accident; an imperative duty devolved upon her to make some effort that would tend to prevent the disaster which to her knowledge was impending. See *Donnelly v. Brooklyn City R.R. Co.* (1888), 109 N.Y.R. 16; *Brickell v. New York Central R.R. Co.* (1890), 120 N.Y. 290; *Miller v. Louisville New Albany and Chicago Railway Co.* (1890), 128 Ind. 97; *Terwilliger v. Long Island R.R. Co.* (1912), 152 N.Y. App. Div. 168, affirmed (1913), 209 N.Y. 522. After all, these cases do no more than embody the principle that, without being guilty of negligence, a passenger cannot sit silent beside the driver in the presence of an obvious danger which he knows is about to be incurred.

In the present case the evidence seems to me to establish that the danger incurred was not obvious to Smythe. From experience he had reason to regard Campbell as a careful driver at high speed—even around curves. He did not apprehend that the speed at which he was being driven at the time of the accident was dangerous, and was, in my opinion, acting as a reasonable man would act in the circumstances. I, therefore, think he was not guilty of negligence in any degree contributing to the accident, and would allow the cross-appeal with costs.

RIDDELL, J.A.:—This case, which was exceedingly well and thoroughly argued on both sides, is of first impression in this Province, so far as I know.

The facts are not numerous or complicated: the plaintiff is a sign-painter living in Belleville, and had painted for the city an advertising sign, which was placed by the side of the public highway a few miles east of Napanee; it required repairing, and the late Charles Campbell, the city engineer, took the plaintiff in his car down to see it that he might give an estimate of the cost of repairs. The two went down in Campbell's automobile, examined the sign, and about midnight left Napanee to return to

Belleville. On this return trip, the car was wrecked at a curve at Deseronto, Campbell killed, and the plaintiff somewhat severely injured. An action being brought against the executrix of the deceased Campbell, charging the deceased with negligence, the defendant, in addition to denying the charge of negligence, set up that "the plaintiff was identified with any negligence that there may have been on the part of the" deceased.

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The action came on for trial at Belleville before Mr. Justice Logie and a jury; the jury answered the questions put to them, and, upon the answers, the learned Judge directed judgment to be entered for the plaintiff for \$1,350 and costs; both parties appeal, the complaints being against the findings of the jury.

In respect of one question, there was some confusion at the trial; as finally settled, however, the questions and answers are as follows:—

1. Was the injury to the plaintiff caused by the negligence of the deceased Campbell? A. Yes.

2. If so, wherein did such negligence on Campbell's part consist? Answer fully. A. By fast driving, and exceeding the lawful speed-limit.

3. Was the plaintiff guilty of any contributory negligence? A. Yes.

4. What negligence on the plaintiff's part do you find? A. He should have checked up on the driver's speed.

His Lordship: You mean by that, that he should have remonstrated with the driver?

The Foreman: Yes.

5. What is the entire amount of damage to which the plaintiff would have been entitled had there been no contributory negligence on his part? A. \$1,800.

6. Is it practicable on the evidence to determine the respective degrees of fault on the part of the deceased Campbell and the plaintiff? A. Yes.

7. If so, what are the degrees in per cent? A. Campbell, 75 per cent.; Smythe, 25 per cent.

8. Did Smythe voluntarily assume the risk of Campbell's fast driving on the occasion in question? A. No.

On the appeal the plaintiff complained of the answers to questions 3, 4, 6, and 7, that he had been guilty of contributory negligence and assessing part of the damages against him, accordingly; the defendant complained (1) of the finding against the deceased of negligence on the evidence adduced and (2) of the answer to question 8.

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Dealing first with the defendant's contentions, (1) is based upon the Evidence Act, R.S.O. 1927, ch. 107, sec. 11:—

"11. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

But, while the evidence adduced as corroborative must have some probative value, it is sufficient if it prove some relevant fact or circumstance which appreciably assists the trial tribunal to believe one or more of the allegations material to the case of the surviving party. It is practically this—that if the evidence adduced as corroboration is such as to induce the trial tribunal to believe the story of the survivor, it is sufficient, and there is no need of corroboration as to every circumstance relied on: *Radford v. Macdonald* (1891), 18 A.R. 167; *Bonnell v. Smith* (1914), 6 O.W.N. 414; *McGregor v. Curry* (1914), 31 O.L.R. 261, at p. 273; *McKean and Co. Ltd. v. Black* (1921), 62 Can. S.C.R. 290, at p. 308; 4 C.E.D. (Ont.), pp. 715-720.

Here the evidence of Carey and Byles is ample corroboration of the plaintiff's story of the speed and the cause of the accident; and we cannot set aside the findings of the jury by reason of defect in the proof.

The second ground of the defendant's appeal raises a somewhat novel question, viz., What was the position of the plaintiff as to interfering with Campbell's driving? No countenance is to be given to the too common practice of what is called "back-seat driving," the interference by a passenger with the management of the automobile by the driver; but there are, undoubtedly, cases in which the passenger is debarred from complaining of the driver's negligence by reason of his own conduct, omission or commission. Such, for example, are cases in which the driver is the employee of the passenger, over whom the latter has control, and who is permitted without interference to drive in a reckless manner; or the two are in a common enterprise, with one passenger having the same right to drive as the other, but knowingly permitting the other to drive carelessly, when he could prevent it; or the passenger takes part in practices which he knows incapacitate the driver, and then entrusts himself to the incapacitated man—many similar instances might be adduced of this principle—the passenger being considered as "*volens*," and, according to our law, "*Volenti non fit injuria*."

No such case is made here. Campbell, on his own business for

his employer, the City of Belleville, was carrying the plaintiff in his car—true, the plaintiff was interested in the business to the extent that he naturally expected to be employed to repair the sign, but, nevertheless, it was the business of Campbell, business that Campbell was looking after, and it was for Campbell's purpose that the plaintiff was being transported in the car. The plaintiff had, of course, no control over Campbell in his management of the car; he was passenger, not driver or director of the driver. Then as to his knowledge of Campbell's manner of driving, his evidence is, to my mind, perfectly plain. He had ridden frequently with Campbell; he was a good driver, fast: "I would like to state . . . Campbell was a good driver." "Ordinarily, he was cautious going around a curve." With knowledge of that kind, I fail to see how there was any want of care in accepting Campbell's invitation to go with him to see the sign. Then, going at his usual rate, they negotiated the trip east safely, passing the curves, including that at which the casualty occurred, not slowing down, but going a little faster than the plaintiff thought they should. On the return trip, some time after midnight, everything went well for a time, the curves were passed safely, until the worst curve on the road was reached. A part of the road was under repair, a short distance east of this curve, and Campbell slowed down a little for this; then he seems to have put on speed, probably to make up for the time lost—he was anxious to get home, to get a good sleep—and was rounding the curve, when he met another car; giving this more room than necessary, he ran against the soft shoulders of the road, rendered dangerous by the recent rain; by reason of the great speed at which he was going, the car was instantly wrecked. He was going at about his usual rate of speed, and, had it not been for the mistake he made in moving too far from the middle of the road, it is probable that the accident would not have happened, notwithstanding that he was going too fast. The plaintiff had no anticipation of danger—he "never felt nervous or uneasy travelling with him at that speed."

Moreover, I can find nothing to indicate that, had the plaintiff interfered, there would have been any beneficial result from his interference.

It would seem, then, that the plaintiff, knowing Campbell to be a good driver, careful in driving around curves, although he went around curves somewhat faster than the plaintiff thought advisable, was driving with him at Campbell's usual rate, that they had passed in safety all the curves going east and all those to the east of this Deseronto one, going west, that he had no uneasiness as to the speed, that, unfortunately, at this curve, the chance of meeting

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another car upon the curve caused Campbell to act negligently, whereupon his car went upon the wet shoulder, the great speed making it inevitable that a casualty would thereby be occasioned. Under these circumstances, I can find nothing improper in the plaintiff's reticence.

Assuming, however, that the speed was dangerous, and that the plaintiff knew it—both of which propositions are baseless upon the evidence—and that, consequently, the plaintiff voluntarily placed himself in a dangerous position, that is not enough: “*sciens*” is not “*volens*.”

In *Canada Atlantic Railway Co. v. Hurdman* (1895), 25 Can. S.C.R. 205, Hurdman had been employed in the shunting yard of the railway company, and well knew the dangerous character of his employment. In shunting, the cars were given too strong a push, and Hurdman was killed. The jury found that the too strong push was negligent, but that Hurdman “voluntarily accepted the risks of the shunting;” this was held unjustified under the circumstances; and Mr. Justice Rose (the trial Judge), the Queen’s Bench Divisional Court, the Court of Appeal, and the Supreme Court of Canada agreed that the defence could not prevail: *Hurdman v. Canada Atlantic Railway Co.* (1893), 25 O.R. 209; *S.C.* (1895), 22 A.R. 292; (1895), 25 Can. S.C.R. 205. That Hurdman knew the dangers of the employment was certain; but the Courts held that he had voluntarily incurred the risks attending the shunting in a careful and skilful manner, and that the maxim “*Volenti non fit injuria*” did not apply. The whole doctrine is developed and discussed in the well-known case of *Smith v. Baker*, [1891] A.C. 325.

In the present case, the plaintiff may be considered to have incurred the risks attending the driving fast, faster, indeed, than he would have driven—but only the risks attending the fast driving itself, while being done with due care. It is quite obvious that it was not the fast driving alone that caused the casualty, although it entered into it; and the jury was justified in finding it negligence which “caused the injury to the plaintiff.”

I have had more trouble with the question raised in the plaintiff’s appeal; but what has already been said of the conduct of the plaintiff, I think, compels me to come to the conclusion that there was nothing in his conduct that can fairly be considered negligence contributing to the casualty. Leaving aside the fact that there is nothing in the evidence to indicate that expostulation by the plaintiff would have had the slightest effect, it would seem that what caused the excessive speed to become effective was the temporary negligence of Campbell, which the plaintiff is not to be held as expecting or as liable for in any way.

It is elementary that there is no such thing as negligence at large and that the only negligence that is of consequence is negligence contributing to the injury.

I think therefore that the appeal of the plaintiff should be allowed, that of the defendant dismissed, both with costs; and that judgment should be entered for the plaintiff for \$1,800 and costs.

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MASTEN, J.A.:—This is an appeal by the defendant from the judgment of Logie, J., after a trial with a jury on the 4th March, 1930. The judgment awards to the plaintiff \$1,350 damages and costs.

The plaintiff was a passenger in a car owned and driven by one Campbell. The car went off the highway, overturned, and Campbell was killed and the plaintiff was injured. The jury found that the accident was due to fast driving by Campbell and that there was contributory negligence on the part of the plaintiff in not checking him.

The defendant appeals on the grounds following: (1) that the plaintiff voluntarily assumed the risk of fast driving and that the maxim *volenti non fit injuria* applied to the accident; (2) that there was no corroboration of the finding of the jury as to the negligence of the deceased driver; (3) that there was no evidence to support the finding of the jury as to the proximate cause of the accident; speed may have been a *causa sine qua non*, but there was no evidence that it was a *causa causans*; (4) that the learned trial Judge should have charged the jury that the plaintiff voluntarily assumed the risk of fast driving.

The plaintiff cross-appeals against the finding of the jury holding the plaintiff guilty of contributory negligence, on the ground that there was no evidence to support such finding.

Having had the opportunity of perusing the reasons for judgment prepared by my brother Riddell, I agree with the conclusions at which he arrives in dealing with the defendant's appeal. I desire only to add an observation respecting the question of "*volens*" raised by the defendant in respect to the answer of the jury to the 8th question. That question reads as follows: "Did Smythe voluntarily assume the risk of Campbell's fast driving on the occasion in question? A. Yes, as percentage." Thereupon the answer so given was discussed as follows:—

"His Lordship: You mean that he voluntarily assumed it, but only as it affected his contributory negligence?"

"The Foreman: Yes.

"His Lordship: You mean, considering it as an element of his contributory negligence?"

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"The Foreman: Yes.

"His Lordship: That is what you say?

"The Foreman: Yes.

"His Lordship: Very well, as I explained to you, the plaintiff will lose one-quarter of his verdict. That will be \$1,350. I think that is a fair verdict, gentlemen.

"Mr. Payne: My Lord, before the verdict is entered for the plaintiff, in respect of the answer of the jury to the last question that was asked, the answer seems to me to be somewhat ambiguous.

"His Lordship: I tried to get the jury to understand that, and they have explained the answer. They mean that the plaintiff voluntarily assumed the risk in the sense that it formed an element of his contributory negligence; but not so as to disentitle the plaintiff to a verdict altogether.

"Mr. Payne: If it was the intention of the jury to find contributory negligence, and no *volens*, as your Lordship said to the jury—if that is what the jury meant—then I would suggest that the answer to question No. 8 should be 'No.'

"His Lordship: Gentlemen, you have heard what counsel has said. You found contributory negligence, and that is all you did find. Do you agree that, under the circumstances, the answer to question No. 8 should be changed from 'Yes, as percentage' to 'No?' You find that the plaintiff was not willing to assume the risk so as to disentitle him to any damages at all. Are you willing to strike out that answer and say 'No' to the last question?

"A juror: I do not just understand the question yet.

"His Lordship: If you had found that the plaintiff had willingly undertaken the risk, with full knowledge of the risk, and all that sort of thing, he would not be entitled to anything. You have answered it, 'Yes, he did assume the risk, but only as a percentage of his contributory negligence;' and that is what you intended?

"The Foreman: Yes.

"His Lordship: I think it would be better to clarify the answer in case it goes higher. If you mean that the plaintiff did not assume the risk in the sense that he would not be entitled to get anything at all, it would be better to strike out that answer, and answer question number 8, 'No.'

"The Foreman: Yes.

"His Lordship: So say you all? (All the jury are agreed). The appellate Court will understand you did not mean he was to get nothing."

On the question so raised by the defendant's appeal, I prefer to base my dismissal on the ground that the question whether the respondent Smythe was "*volens*" or not is wholly a question of fact for the jury, and if there is *any* evidence on which a jury of honest and reasonable men could find as this jury did, we cannot interfere. My brother Riddell has demonstrated beyond peradventure that there was evidence on which a jury might find as this jury did. All that I am concerned to make clear is that in my view the question is a pure question of fact and not in any sense a question of law, and that if on this evidence the jury had taken a different view and had found that Smythe was fully aware of Campbell's habits in driving—that his habitual speed at night was such as to involve substantial risk and that knowing this Smythe voluntarily assumed the risk—if, as I say, the jury had upon such grounds answered question 8 in the affirmative, I would have felt myself unable to set aside that answer or to direct a new trial.

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Dealing now with the plaintiff's appeal against the finding of contributory negligence on his part, the question, in my opinion, is again one of fact. I think that when the Campbell car was about meeting another car while rounding a curve, there was nothing that the plaintiff at that moment could have done to obviate the accident that took place. The fact is, though, that not merely at that particular juncture was Campbell driving recklessly, but there had existed continuously throughout the drive from Napanee a rate of speed which the plaintiff knew, or ought to have known, involved serious risk, and he failed to remonstrate or try to check Campbell's speed, though the relations between the two men would appear to have been such that a remonstrance might well have been effective. I am unable to say that in neglecting to ask his friend to moderate his speed the plaintiff was not guilty of omitting a precaution which a reasonable man would have taken for his own safety or to say that a slower rate of speed would not have averted the accident. For that reason I am unable to say that there was no evidence on which the jury could find as they did. I think that their finding cannot be disturbed on this appeal, and I would therefore dismiss the plaintiff's cross-appeal.

ORDE, J.A.:—I agree with the judgments of my Lord the Chief Justice and my brother Riddell.

FISHER, J.A.:—I agree with Masten, J.A.

Appeal dismissed and cross-appeal allowed (MASTEN and FISHER, JJ.A., dissenting as to the cross-appeal).

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1930.

HENDERSON V. LAFRAMBOISE.

June 20.

ROBERTSON V. LAFRAMBOISE.

Costs — Depriving Successful Party of — Discretion of Trial Judge — Appeal—Judicature Act sec. 77(3).

The discretion of the trial Judge over costs in an action tried with a jury is, under sec. 77(3) of the Judicature Act, as unrestricted as it is in an action tried without a jury.

Unless an appellant satisfies the appellate Court that the trial Judge in disposing of the costs of the action has proceeded on some erroneous principle of law and has not in fact exercised his discretion on the facts of the case, the Court will not substitute its discretion for the discretion of the trial Judge.

And where the trial Judge, while giving judgment on the jury's finding in favour of the plaintiffs, deprived them of costs, in the exercise of his discretion, the Court upon appeal refused to interfere.

APPEALS by the defendant in the two actions and cross-appeal by the plaintiffs in the *Robertson* action from judgments of RANEY, J., after trial of the two actions together with a jury, awarding the plaintiffs in both actions damages for their respective injuries sustained in a collision of motor-vehicles upon a highway, the jury having found that the negligence of the defendant was the cause of the injuries. The trial Judge allowed the plaintiffs in the *Robertson* action no costs, and their cross-appeal was from that part of the judgment.

May 22. The appeals and cross-appeal were heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, JJ.A.

G. F. Henderson, K.C., for the defendant, argued that there was no duty cast upon him, when passing the plaintiff Henderson's motor-car, to have kept so far out as to enable him, the defendant, to see the whole of the road in front of the plaintiff Henderson's motor-car. The defendant was entitled to assume that there was no car hiding behind another car. The defendant was not guilty of any negligence causing the accident. The Robertson car should have been saddled with all the blame: *Carter v. Van Camp*, [1930] S.C.R. 156, at p. 161.

[At the close of the argument for the defendant, the Court dismissed the appeal with costs.]

A. W. Beament, for the plaintiffs, upon the cross-appeal, argued that the successful plaintiffs should have been awarded their costs. The Judge's discretion referred to in sec. 74, subsec. 3, of the Ontario Judicature Act is a judicial, not an arbitrary, one, and was not judicially exercised in this instance: *In re*

Pattullo and Town of Orangeville (1899), 31 O.R. 192; *Field v. Richards* (1913), 4 O.W.N. 1301, 24 O.W.R. 606; *Byers v. Kidd* (1906), 13 O.L.R. 396; 3 C.E.D. (Ont.), p. 55. An appellate court has the right to alter the judgment of the court below as to costs: *Tetef v. Riman* (1926), 58 O.L.R. 639; *Vipond v. Sisco* (1913), 29 O.L.R. 200.

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Henderson, K.C., in answer to the cross-appeal, contended that, unless it could be shewn that the learned Judge below based his decision on some erroneous principle of law, or capriciously exercised his discretion as to the awarding of costs, it could not be interfered with.

June 20. The judgment of the Court was read by MASTEN, J.A.:—These actions were tried together and the appeals argued in like manner. The main appeal, which was brought by the defendant, was dismissed with costs at the hearing.

In the *Robertson* case the learned trial Judge, in the exercise of his discretion, while entering judgment for the plaintiffs for the several sums found by the jury, did not see fit to make any order as to costs; in other words, in the exercise of his discretion, he declined to award to the plaintiffs the costs which a successful plaintiff has a reasonable expectation of recovering from the defendant. From this judgment the plaintiffs in the *Robertson* action have entered a cross-appeal, alleging that no adequate ground existed to enable the trial Judge to exercise a discretion to deprive the plaintiffs of costs, and that such discretion, if it existed, was not exercised judicially. That question was reserved.

In considering the decisions in our own courts, and comparing them with the decisions under the English Judicature Act, it is to be observed that the English Rule (O. 65, r. 1) provides that in jury cases costs shall follow the event unless the Judge "shall for good cause otherwise order," while our rule (Ontario Judicature Act, sec. 77, subsec. 3) provides that "where an action or issue is tried by a jury, the costs shall follow the event unless the Judge before whom the action is tried in his discretion otherwise orders."

The discretion of the trial Judge over costs in actions tried with a jury seems to be as unrestricted as is his discretion in actions tried without a jury. In 3 C.E.D. (Ont.), p. 55, para. 28, will be found a reference to numerous cases in our own courts where, on various grounds, the trial Judge, in the exercise of his discretion, deprived a successful party of costs.

The grounds are as varied as the facts of the different cases, and, as I read the most recent cases, unless the appellant satisfies the court of appeal that the trial Judge has proceeded on some

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erroneous principle of law and has not in fact exercised his discretion on the facts of the case, an appellate court will not substitute its discretion for the discretion of the trial Judge. Here the plaintiffs fail to shew that the Judge proceeded on any mistaken view of the law. He does not state the facts which led him to exercise his discretion in the way he did, and there is nothing to indicate what he relied on. The alcoholic condition of the party in the Feeney car, the indiscretion of Robertson in lending his car to persons who turned out to be alcoholically inclined, and the comparatively slight degree of blame resting on the defendant when compared with the negligence of Feeney, may well have been the facts which influenced him. Whether this is so or not, the plaintiffs have in my opinion failed to satisfy the onus that rested on them of establishing in this Court that the trial Judge proceeded erroneously in law and failed to exercise his discretion, or that he exercised his discretion against the plaintiffs on grounds wholly unconnected with the cause of action. These appear to be the only grounds on which this Court is permitted to interfere with the disposition of costs by the trial Judge.

The cases which, before the decision by the House of Lords in *Donald Campbell & Co. Ltd. v. Pollak*, [1927] A.C. 732, limited the discretion conferred on the trial Judge by the Judicature Act, have been swept away by that decision, and, subject to the exceptions noted above, the discretion is now unfettered.

In the case of *The Young Sid*, [1929] P. 190, the Court of Appeal (Scrutton, L.J., Greer, L.J., and Sankey, L.J.) considered O. 65, r. 1, as applied in Admiralty where there had been a collision between vessels. The *Donald Campbell* case is discussed at length and applied, and the unfettered discretion of the Admiralty Courts over costs is confirmed.

There is no doubt that the trial Judge in the exercise of his discretion must act judicially; no doubt he must bear in mind that in the absence of special circumstances the successful party is entitled to a reasonable expectation of obtaining an order for the payment of his costs by the unsuccessful party; but, if the trial Judge, upon facts connected with or leading up to the litigation, exercises his discretion to withhold those costs from him, the discretion of the trial Judge is unfettered, and a court of appeal is not entitled to substitute its discretion for his.

Even if the trial Judge has given leave to appeal as to costs within his discretion, "it is not the duty of the Court of Appeal to rehear the case, and that court will not interfere with his discretion unless he has proceeded in his judgment on some erron-

eous principle of law and has not in fact exercised his discretion on the facts of the case. The Court of Appeal has no right to substitute its discretion for the discretion of the Judge in the Court below;" *per* Lindley, L.J., in *Young v. Thomas*, [1892] 2 Ch. 134, at p. 136. See also *In re Gilbert* (1885), 28 Ch. D. 549; *Metropolitan Asylum District Managers v. Hill* (1880), 5 App. Cas. 582; Holmested's Judicature Act, pp. 115, 251; *Campbell v. Wheeler* (1896), 17 P.R. 289.

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In my opinion the cross-appeal of the plaintiffs in the *Robertson* action should be dismissed with costs.

Appeal dismissed.

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Interest—Mortgage—Interest Act, secs. 6, 9.

Where there was nothing upon the face of the mortgage which brought it within the provisions of sec. 6 of the Interest Act, R.S.C. 1927, ch. 102, it not being by its terms made payable on the sinking fund plan, nor on any plan under which the payments of principal money and interest are blended, and where the mortgage had on its face a statement shewing the amount of the principal money and the rate of interest chargeable (17 per cent.), the mortgage was *held* not to come within sec. 6, and therefore sec. 9 did not apply.

And the payment of 1 per cent. interest in advance did not operate to bring the case within the provisions of sec. 6.

London Loan and Savings Co. of Canada v. Meagher, [1930] S.C.R. 378, followed.

AN appeal by the plaintiffs from the judgment of MORSON, Jun.Co.C.J., sitting in the First Division Court of the County of York, dismissing an action to recover the sum of \$141.89 alleged to have been paid by the plaintiffs to the defendant for interest upon a mortgage.

June 5. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

R. M. Willes Chitty, for the appellants.

H. B. Proudlove, for the defendant, respondent.

June 20. The judgment of the Court was read by MASTEN, J.A.:—This is an appeal from the judgment of his Honour Judge Morson dated the 14th May, 1930, whereby he dismissed the plaintiffs' action.

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The plaintiffs' claim is founded on sec. 9 of the Interest Act, R.S.C. 1927, ch. 102, the claim being for \$141.89.

When the facts of this case are made clear, it is plain that the mortgage does not on its face fall within the purview of sec. 6 of the Act, and therefore that sec. 9 does not apply. On its face the mortgage provides as follows:—

“Provided this mortgage to be void upon payment of \$850 in gold or its equivalent in lawful money of Canada with interest at 17 per cent. per annum as follows:—

“The sum of \$25 on account of the principal sum shall become due and be payable on the 27th day of March, 1929; \$25 on account of the principal sum shall become due and be payable on the 27th day of June, 1929; \$25 shall become due and be payable on the 27th day of September, 1929; and the balance of the said principal sum of \$850 shall become due and be payable on the 27th day of December, 1929; and interest quarterly yearly at the said rate as well after as before maturity and both before and after default on such portion of the principal as remains from time to time unpaid on the 27th days of March, June, September, and December in each year, until the principal is fully paid; the first payment of interest to be computed from the 28th day of December, 1928, upon the whole amount of principal hereby secured, to become due and payable on the 27th day of March next, 1929.”

The stated case agreed upon between the parties, and in pursuance of which the decision was given, contains, among others, the following statements:—

“3. The defendant on the 28th December, 1928, advanced to the plaintiffs the amount of the mortgage, which was \$850, and the defendant paid the sum of \$85, being the interest at the rate of 10 per cent. per annum, which all parties agreed should be paid in advance, and from which said sum of \$850 certain proper legal fees and expenses were also paid by the plaintiffs according to arrangements. The plaintiffs, having paid \$85 for interest at the beginning of the loan, therefore had interest to pay at the rate of 7 per cent. from time to time on the balance of the principal due.

“4. The plaintiffs paid the sum of \$25 for principal and the following amounts for interest on the following days: March 27th, \$14.88; June 27th, \$14.45; Sept. 27th, \$14; Dec. 27th, \$13.56: making a total of \$56.89.”

The above payments of interest are computed respectively on \$850, \$825, \$800, and \$775, at the rate of 7 per cent. per annum exactly as specified in the mortgage.

The Supreme Court of Canada in the *Meagher* case decided that sec. 6 does not apply unless on the face of the mortgage it falls strictly within the terms of that section. It is plain from the above quotation that there is nothing on the face of the mortgage itself which brings it within the provisions of sec. 6, for it is not by its terms made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended. I am not sure that I know what is meant by the words "on any plan which involves the allowance of interest on stipulated repayments," but it is sufficient to say that those words can have no application to the terms of this present mortgage. Moreover, the mortgage in question does contain on its face a statement shewing the amount of the principal money and the rate of interest chargeable as 17 per cent.

The decision of the Supreme Court in *London Loan and Savings Co. of Canada v. Meagher*, [1930] S.C.R. 378, also makes it clear that the payment of 10 per cent. interest in advance (\$85) does not operate to bring the case within the provisions of sec. 6, and that the view which had been entertained in the Court below and in the prior cases was not warranted. In that case the judgment of Smith, J., contains the following passage (p. 381):—

"I am of opinion that the payment of the full amount of \$30,000 by the mortgagee and payment of the bonus by the mortgagor's cheque, as arranged, had no different legal effect from payment of that bonus by simply deducting and retaining it from the loan: *Mainland v. Upjohn* (1889), 41 Ch.D. 126, at pp. 143, 144.

"If, as argued, the bonus became a debt owing by the mortgagor to the mortgagee as consideration for the loan outside of the mortgage, the liability would have been satisfied by retention of the amount from the mortgage-moneys, just as any other debt that might have been owing by the mortgagor to the mortgagee might have been paid effectually in that way."

The case seems too plain to necessitate any further discussion.

Appeal dismissed with costs.

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RIVERDALE GARAGE LTD. v. BARRETT BROTHERS.

June 20.

Bailment—Gratuitous Loan of Truck—Liability of Borrower for Negligence Causing Damage to Truck—Whether Negligence actually Established—Street-railway—Right of Way—Driver of Truck Getting off Railway-tracks upon Signal from Street-car—Toronto Street Railway Company Act, 1861, 24 Vict. ch. 83 (Can.)—Railway Act, R.S.O. 1927, ch. 224, sec. 260(o)—Attempt to Return Truck—Legal Effect of.

The defendants, having delivered their motor-truck to the plaintiffs to be repaired, the plaintiffs lent the defendants a truck for the time their own was under repair. The borrowed truck was injured while being driven by the defendants' servant, and the plaintiffs sued for damages, alleging negligence:—

Held, that the defendants were gratuitous bailees, the bailment being for their sole benefit, and the onus was upon them to prove that they were not guilty of even slight negligence.

Coggs v. Bernard (1703), 2 Ld. Raym. 909, 3 Ld. Raym. 163, followed, and *Giblin v. McMullen* (1869), L.R. 2 P.C. 317, distinguished.

It appeared that the defendants' servant, driving the borrowed truck upon a city street on a day in early March, finding the pavement full of ruts, icy and slippery, turned upon the street-railway tracks; the driver of a street-car following him sounded his gong, thus claiming the right of way. The defendants' servant, knowing the condition, immediately turned off the car-tracks upon the dangerous pavement, instead of waiting for a safe place, such as the next cross-street, ran into a post, and so injured the truck:—

Held (FISHER, J.A., dissenting), that this was negligence, and the defendants had not discharged the onus which was cast upon them.

Per RIDDELL, J.A.:—The street-car had the right of way, but it is lawful for the public to travel on the tracks, provided they do not interfere with or impede the running of the cars: *Toronto Street Railway Company Act, 1861, 24 Vict. ch. 83 (Can.)*; *Railway Act, R.S.O. 1927, ch. 224, sec. 260 (o)*. The provisions of the statutes, being rules of the road, must be interpreted reasonably. The owners of the street-railway have no right to compel one who happens to be upon their track to get off immediately they wish it, without regard to whether this can be done with reasonable safety—they cannot force another into a perilous position, at least if the peril is an obvious one.

Per MASTEN, J.A.:—An attempt by the defendants to return the borrowed truck and receive their own back did not alter the legal relationship of the parties in such a way that the truck should be regarded as being thereafter held by the defendants, not for their own convenience, but for the convenience of the plaintiffs.

Per FISHER, J.A.:—The driver of the truck did what any ordinary person would be expected to do in the circumstances, and the contact of the wheel of the truck with the ice near the kerb, causing the truck suddenly to swerve, was something that an ordinarily prudent person could not in the circumstances have avoided—it was a pure accident, and not negligence.

AN appeal by the plaintiffs from the judgment of the County Court of the County of York (TYTLER, Jun. Co. C.J.), dismissing an action to recover \$205.60 for repairs made to the plaintiffs' motor-truck, they alleging that the truck had been lent to the de-

fendants and returned in a condition which necessitated the repairs; and alleging also that the truck was damaged by reason of the defendants' negligence. The action was tried in the County Court without a jury, and the Judge found that there was no negligence on the part of the defendants.

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June 6. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

P. C. Finlay, for the appellants, argued that the learned trial Judge erred in granting a nonsuit on the ground that the appellants had not proved negligence on the part of the defendants. The onus was on the defendants to disprove negligence, and not on the appellants to establish it: *Jones on Bailments*, 4th ed., p. 65. But it was proved that the defendants' chauffeur was guilty of some negligence in going off the street-railway track into what he knew was obvious danger, and the defendants, being gratuitous bailees, were rendered liable when a slight degree of negligence was shewn: *Coggs v. Bernard* (1703), 2 Ld. Raym. 909, 3 Ld. Raym. 163; *Halsbury's Laws of England*, vol. 1, p. 538; *Vaughan v. Menlove* (1837), 3 Bing. N.C. 468, at p. 475; *Beal's Law of Bailments*, p. 122; *Story on Bailments*, 9th ed. p. 246, sec. 278; 1 C.E.D. (Ont.), p. 364; 4 C.E.D. (Ont.), pp. 787, 788; *Pratt v. Waddington* (1911), 23 O.L.R. 178; *Carlisle v. Grand Trunk Railway Co.* (1912), 25 O.L.R. 372.

T. N. Phelan, K.C., for the defendants, respondents, contended that it was simply a case of deposit, not bailment. The appellants had a truck of the respondents to repair, and lent a truck to the respondents in its place. The respondents tried to return the appellants' truck and get back theirs, but it was not ready, and so the respondents held the appellants' truck at the time of the accident only for the appellants' accommodation; and so would only be liable for gross negligence, which had not been proved: *Giblin v. McMullen* (1869), L.R. 2 P.C. 317. In fact, the respondents were not guilty of any negligence.

June 20. LATCHFORD, C.J.:—This appeal is from the judgment of his Honour Judge Tytler in the County Court of the County of York dismissing the action with costs.

The plaintiffs' claim is for \$205.60, damage negligently caused, it is said, to a truck which they had lent to the defendants. The defence is that the damage was the result of an unavoidable accident. The quantum is not in dispute, and the sole question is whether the defendants are liable in the circumstances.

The bailment was gratuitous, and therefore not *depositum* but *commodatum*, and consequently, as a matter of clear law, the

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bailees were liable for even slight negligence causing damage to the article lent: *Coggs v. Bernard*, 1 Sm. L.C., 13th ed., 191, at p. 199.

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"The borrower must exercise the utmost diligence in his use of the chattel borrowed and is liable for the least degree of negligence." 1 C.E.D. (Ont.), p. 364.

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This does not mean that the *exactissima diligentia* of the Roman law is called for, such as that in case of accidental fire the *commodatarius* must save the borrowed chattel though he lose his own; but he must shew that there was no negligence on his part occasioning the loss: Story on Bailments, 9th ed., ch. IV., especially sec. 253b; Halsbury's Laws of England, vol. 1, p. 538.

Damage was caused to the truck while being used for the defendants' purposes by George Newman, one of their employees. Accordingly there was resting upon them the onus of establishing that the injury so caused was not occasioned by any negligence on the part of their servant. In my opinion, not only was that onus not discharged, but there is ample evidence that the accident was due to actual negligence for which the defendants are responsible.

On the 7th March, 1929, about 5.30 p.m., while it was still daylight, the truck with a ton load of fruit was being driven westerly on Dundas-street about a block east of Bathurst-street, in the city of Toronto. Its course, in part at least, extended over the street-car rails north of the centre of the street. From 3 or 4 feet north and south of the double line of rails, the street had been swept clear; the pavement was "icy and slippery," and between the northerly rail and the kerb there was snow and ice, about 6 inches thick, according to the driver, in which the wheels of west-bound motor-vehicles had cut grooves or ruts. Newman adopted a suggestion made by the defendants' counsel that the ruts, like the ice and snow, were about 6 inches deep. Assuming that to be the case, they were obviously easy to get into, though hard to get out of. When Newman turned to the north, seeking to move out of the way of a following street-car, he not only did not turn his wheels into and along the ruts, but, according to his own statement, ran diagonally across the ruts towards the sidewalk, where he observed that there were two children. In order to avoid them, he turned to his left and ran into a post. In answer to the Court, he said that there was nothing else that he could have done.

I think there were a number of things that he could have done. Before turning off the street-car tracks he could have reduced his speed, so that it would not have been at that moment, as he admits it was, "around 15 to 18 miles an hour." To attempt to turn into the ruts on his right across an icy pavement and ice and snow,

at such a speed, was in itself so dangerous that there was nothing which he could then do to avert disaster. Besides, though I do not regard the fact as important, he could have run safely along his previous course to Bathurst-street and there turned out of the way of the street-car.

With submission I find myself unable to agree with the finding of the learned trial Judge that the defendants (through Newman) shewed "all the care that was necessary, all the care that they could exercise in regard to getting off the street (car-track) at the time."

Newman was, in my opinion, negligent, and his negligence caused the damages claimed.

I would allow the appeal with costs and direct judgment to be entered in the court below for \$205.60, with interest and costs.

RIDDELL, J.A.:—The plaintiffs are a company whose business includes the repair of motor-vehicles; the defendants are wholesale fruit and commission merchants. In March, 1929, the defendants gave one of their delivery trucks over to the plaintiffs to repair, and, according to the evidence, they were lent a demonstrator-truck during the time their truck was under repair. Much was said during the trial and before us concerning the circumstances under which the loan was made; but I find nothing in the evidence but the statement already made as to the loan of the demonstrator-truck. I accept the statement of Mr. Phelan when arguing for a nonsuit on behalf of the defendants: "Our truck was brought in to be repaired and they loaned us a truck during the time that ours was in there for repairs. Now, that was purely a gratuitous favour. There would not be any doubt about that." There is, indeed, some evidence that the plaintiffs used the truck which was given them to repair; but that is explained by the plaintiffs' witness as being for the purpose of testing it: so that the case stands as Mr. Phelan put it—a gratuitous loan by the plaintiffs to the defendants, a gratuitous favour.

While being driven by the defendants' servant, the borrowed truck was injured; the plaintiffs repaired it and sued for damages. The learned trial Judge, his Honour Judge Tytler, gave judgment for the defendants; and the plaintiffs now appeal.

The defendants at the trial and before us relied strongly upon the well-known case of *Giblin v. McMullen*, L.R. 2 P.C. 317, as binding upon the Court and requiring a holding that it was necessary for the plaintiffs to prove gross negligence. That, however, is quite a different case: a customer delivered to his banker some securities to keep, gratuitously, for him; they were lost, and it was held in the Privy Council that the onus was on the bailor to prove negligence of an aggravated character. There the bailment

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was wholly for the advantage of the bailor, the bailee charging nothing for taking care of his property for him; and that is the sense in which the expression "gratuitous bailment" is used. Had the truck in the present case been delivered to the defendants for them to take care of it for the plaintiffs, for the plaintiffs' sole advantage, the cases would be parallel; but that, of course, is not the case—the sole advantage was the advantage of the defendants. The rule in *Giblin v. McMullen* would have been different if the customer had allowed the banker to have the use of his securities for the banker's advantage: then the cases would have been parallel.

Ever since the classic case of *Coggs v. Bernard*, 2 Ld. Raym. 909, 3 Ld. Raym. 163, 1 Sm. L.C., 13th ed., 191, it has been clear law that a gratuitous bailee, in the sense that the bailment is for his sole benefit and gratuitous *quoad* him, has cast upon him the onus of proving that he was not guilty of even slight negligence when the bailed article was lost, destroyed or injured, so that he did not redeliver it, when demanded, in the state in which he received it.

The learned County Court Judge seems to have understood this to be the law, but, after the persuasive argument of the defendants' counsel, to have changed his mind. The grounds of his decision are thus put:—

"I think on the application for a nonsuit, as there was no evidence of negligence shewn by the plaintiffs, the nonsuit should be granted. I also think that the defendants have shewn all the care that was necessary, all the care that they could exercise, in regard to getting off the street at the time when they had to get off."

The error in law of the first reason has been pointed out—no nonsuit was possible, as the onus of disproving negligence was upon the defendants. It remains to consider the second; and in this it will be well to keep in mind the precise language—the defendants "have shewn all the care that was necessary, all the care that they could exercise, in regard to getting off the street at the time when they had to get off."

Taking now the facts of the accident: the servant of the defendants was driving the truck, with a load of fruit, westerly on Dundas-street, approaching Bathurst, on the 7th March, 1929; the pavement was "rutty, icy, slippery ruts . . . icy, very rutty;" most sensibly, under those conditions, the chauffeur drove on the street-car tracks; behind him came a street-car which sounded its gong, claiming the right of way; the chauffeur, knowing the condition as he himself described it, turned off the car-tracks into

this dangerous road, instead of waiting for a safe place, e.g., the next cross-street, and the natural result followed—a result which he should have anticipated might follow. Upon these facts, I am unable to see how the defendants have satisfied the onus cast upon them of disproving all negligence. The sole excuse given for the act of the chauffeur is the signal of the street-car; of course, the street-car had the right of way; but, ever since the original Act of incorporation of the Toronto Street Railway Company (1861), 24 Vict. ch. 83 (Can.), it has been lawful for the public to “travel on the . . . tracks . . . provided they do not interfere with or impede the running of the cars. . . .” This provision must, like all other provisions of the kind, be read reasonably; and there is no legal interference with the running of the cars where to remove a vehicle from the tracks would be to run into obvious danger. The existing general statute, the Railway Act, R.S.O. 1927, ch. 224, sec. 260 (*o*), does not go farther in reducing the rights of the public to the use of the street; it reads:—

“All persons using the highway shall be at liberty to travel upon any part of the travelled roadway occupied by the company’s railway, and in the same manner as upon other portions of the highway, and vehicles of every description shall be allowed upon such portion of the highway, but the company’s cars shall have the first right of way over the railway, and all vehicles or persons travelling on that portion of the highway occupied by the railway shall turn out to let the trains or cars pass.”

All rules of the road are to be interpreted reasonably—*cf.* 29 Corpus Juris, p. 653, sec. 418 (4), *sqq.*; Halsbury’s Laws of England, vol. 21, p. 418; *Wayde v. Carr* (1823), 2 D. & Ry. 255; *Turley v. Thomas* (1837), 8 C. & P. 103; *Finegan v. London and North Western Railway Co.* (1889), 53 J.P. 663. Denman, J., in the last named case, speaking of the rule of the road to pass (in England) to the left, says (p. 663):—

“Now, it has been held, and always held, that there is no such rule of the road as to make the left always the proper side. There are many old cases which go to that, and it will be idle and absurd to lay it down as law, that where there is danger in keeping to the left, the vehicle is bound to keep to its left and incur the danger . . .”

In the case of the street-railway, the statutory right of way is no more extensive than the right of way given by the Common Law; it does not entitle the company to insist that vehicles must get off their track as soon as their car needs to use the track where the vehicle is for the time being, if that should involve obvious danger; they have no right, statutory or otherwise, to compel one

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who happens to be upon their track to get off immediately they wish it, without regard to whether this can be done with reasonable safety—they cannot force another into a perilous position, at least if the peril is an obvious one. There was nothing to prevent the defendants' chauffeur remaining upon the track until he could leave it with reasonable safety, whether at the next cross-street or otherwise. And, in my view, there was negligence in the chauffeur's going off the street-car track into what he knew was a dangerous place.

If the law were so absurd as to compel a chauffeur to get off the track, when signalled, without regard to whether he could do so with reasonable safety, I should be prepared to hold that it was negligence for him to go upon the track at all so as to subject him to the necessity of running into serious danger which he could not avoid by any volition or care of his own.

I think that the defendants have not made out their defence, that the appeal should be allowed with costs, and judgment entered for \$205.60, interest from the teste of the writ, and costs.

MASTEN, J.A.:—Having had the opportunity of perusing the judgments which have been prepared by my Lord the Chief Justice and by my brother Riddell, I agree in the conclusion which they have reached, also in the reasons upon which that conclusion is founded, and I desire to add only one observation.

Because, prior to the accident, the defendants had gone to the plaintiffs' establishment to return the car borrowed from them; and to receive back their own, it is argued that the legal position was entirely changed, so that (whatever may have been the original arrangement) the injured car was thereafter held by the defendants, not for their own convenience, but for the convenience of the plaintiffs. I am unable to take that view of the facts. I think that the offer to return did not alter the legal relationship of the parties.

The appellants and the respondents, who had theretofore been doing business with each other, naturally desired mutually to accommodate each other. Therefore, by mutual consent and for mutual convenience, as the plaintiffs' car could not at the moment be returned, the original arrangement was continued, and the defendants remained gratuitous bailees of the plaintiffs' truck, entitled to use it without recompense until their own was repaired and returned. That being so, the defendants were liable for the very slightest negligence; and, for reasons which have been adequately stated by other members of the Court, I am of opinion that the defendants were guilty of such negligence.

The appeal should be allowed with costs.

ORDE, J.A., agreed with LATCHFORD, C.J.

FISHER, J.A.:—I entirely agree with my brethren that if the defendants are guilty of even slight negligence they are liable, but I am far from being convinced that there is any evidence in this case establishing negligence on the part of the defendants.

I also agree that, because a driver of a truck receives a gong-warning from a street-car approaching from the rear, he is not bound immediately to turn off the tracks, if he has reasonable grounds for believing that by doing so he will run into danger. Apart from some ruts in the street, there was no ice formed in the street excepting at about 3 feet from the kerb, and the accident was caused by the wheel of the truck skidding on the ice near the kerb. I cannot think that it was even slight negligence for the driver to have turned off the tracks at the time he did, and at the speed he was then going. The driver of the truck did what any ordinary person would be expected to do in the circumstances, and the contact of the wheel of the truck with the ice near the kerb, causing the truck suddenly to swerve, was something that a prudent and ordinary person could not in the circumstances have avoided. To my mind it was a pure accident, and not negligence.

I would dismiss the appeal with costs.

Appeal allowed (FISHER, J.A., *dissenting*).

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[APPELLATE DIVISION.]

NATIONAL SANITARIUM ASSOCIATION v. TOWN OF BRACEBRIDGE.

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June 20.

Municipal Corporations—Liability of Town Corporation for Maintenance and Treatment of Indigent Patient in Hospital—Town not Separated from Unorganised District—Implied Repeal of Statutory Provision.

Section 15(2) of the Sanatoria for Consumptives Act, R.S.O. 1927, ch. 357, is not impliedly repealed by sec. 21 of the Hospitals and Charitable Institutions Act, R.S.O. 1927, ch. 359.

The judgment of MIDDLETON, J. A., *ante* 177, was reversed and the plaintiff association was *held* entitled to recover from the defendant municipality the sum claimed for maintenance and treatment of an indigent patient who was resident in the municipality at the time of his admission to the association's hospital.

AN appeal by the plaintiff association from the judgment of MIDDLETON, J.A. (1930), *ante* 395, dismissing the action.

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June 6. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

J. M. Godfrey, K.C., for the appellant, argued that the Sanatoria for Consumptives Act, R.S.O. 1927, ch. 357, sec. 15 (2), applied and made the defendant liable. This section (which was formerly R.S.O. 1914, ch. 298, sec. 16 (2)) was not impliedly repealed by sec. 2 of ch. 73 of the Statutes of Ontario, 1926.

W. A. Boys, K.C., and *Redmond Thomas*, for the defendant, respondent, contended that sec. 16 (2) of R.S.O. 1914, ch. 298, was impliedly repealed by the legislation of 1926. The statutory provision which governs this case is sec. 21 of the Hospitals and Charitable Institutions Act, R.S.O. 1927, ch. 359, sec. 21.

June 20. The judgment of the Court was read by LATCHFORD, C.J.:—Appeal from the judgment of Mr. Justice Middleton dismissing with costs a motion for judgment upon facts admitted by both the parties to an action for \$1,171.50 for maintaining a person who was an indigent resident of the town of Bracebridge at the time of his admission to one of the appellant's sanatoria. Bracebridge is in the territorial district of Muskoka, and is not a "separated town," as defined by sec. 1 (p) of the Municipal Act, but is a municipality: sec. 1 (l). It is not suggested that the town has established or is a party to an agreement under which a joint sanatorium has been established by which patients admitted from it are to be maintained.

The grounds of the decision of the learned Judge are thus stated:—

"I have come to the conclusion that the amendment of 1926 must be regarded as the last expression of legislative intention and must prevail, and that it operates as an implied repeal of the inconsistent provision of sec. 16 (2)—15 (2) in the Revision. I am aided in this by the feeling that the Legislature is not likely to have intended to relieve towns and villages in counties and to have left the full burden upon small and often poor towns and villages in the unorganised districts, particularly when these are faced with a far greater share of tuberculous residents who migrate there from the older portions of the Province."

The amendment of 1926 is 16 Geo. V. ch. 73. However, it is not the last expression of the intention of the Legislature, except as it is found repeated (with minor additions of no importance here) in R.S.O. 1927, ch. 357, sec. 21. The latter is the last word in legislation on the question involved in this appeal. As enacted in the revision does it repeal sec. 15(2) of the Sanatoria for Consumptives Act? For my part, and with the utmost re-

spect for my learned brother, I am unable to consider that it does.

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However harshly the enactment may press upon municipalities like the respondent, it appears plainly to me that the retention in the last revision of sec. 15(2) imposes a duty on the treasurer of Bracebridge that he shall out of the money of the corporation pay to the appellant the sum claimed, which is \$1.50 per day for its maintenance and treatment of the indigent patient who was resident in the town at the time of his admission

Accordingly I am of opinion that the appeal should be allowed with costs and judgment entered for the amount claimed with costs.

Appeal allowed.

[APPELLATE DIVISION.]

CITY OF BRANTFORD V. IMPERIAL BANK OF CANADA.

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June 20.

Assessment and Taxes—Seizure by Municipality of Goods upon Premises of Manufacturer for Taxes upon Realty and Business Tax—Bank in Exclusive Possession of Premises and Business as well as Goods by Virtue of Security under sec. 88 of Bank Act, R.S.O. 1927, ch. 12, sec. 88—Assessment Act, R.S.O. 1927, ch. 238, sec. 112, subsec. 1, proviso—"Person Taxed" not in "Possession"—Invalidity of Seizure—Constitutional Law—Absence of Conflict between Dominion and Provincial Acts.

The judgment of the trial Judge, RANEY, J. (1929), 64 O.L.R. 671, was affirmed, for reasons different from those stated by him.

Held, that the bank was in actual and exclusive possession of the premises and business as well as the goods upon the premises of the P. company at the time when the city corporation seized the goods for taxes upon the realty and for business tax; the P. company, "the person taxed," was not then in possession within the meaning of the proviso following cl. 4 (d) of subsec. 1 of sec. 112 of the Ontario Assessment Act, R.S.O. 1927, ch. 238; and the seizure for taxes was therefore invalid.

There is no real conflict between the Assessment Act and the Dominion Bank Act, under the authority of which latter Act, by virtue of a security in the form schedule C, sec. 88, the bank took possession.

Per RIDDELL, J.A. (LATCHFORD, C.J., and FISHER, J.A., concurring):—The Dominion Act vests the property in the bank, and the Provincial Acts do not purport to prevent this; the Provincial Act makes no distinction between property thus acquired by the bank and its other property, and the Dominion Act does not provide that there shall be any distinction.

Per MASTEN and ORDE, J.J.A.:—The trial Judge was wrong in his view that the security of the bank taken under sec. 88 was immune from seizure for municipal taxes. The Legislature of Ontario has power to impose taxes on a bank and to authorise municipal authorities to assess and levy municipal taxes upon banks and property held by banks.

AN appeal by the plaintiffs from the judgment of RANEY, J., 64 O.L.R. 671.

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March 25 and 26. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

W. T. Henderson, K.C., for the appellants. The trial Judge erred in holding that the Assessment Act, R.S.O. 1927, ch. 238, is in conflict with sec. 88 of the Bank Act, R.S.C. 1927, ch. 12, and that therefore the Assessment Act is invalid in that respect. There is no conflict if each Act is properly interpreted. Section 88(7) gives the bank rights; sec. 86(2) says what those rights are. The bank takes the title of the previous owner, but nothing more. The rights of the municipality are therefore superior: Assessment Act, sec. 112, subsec. 1, para. 4(b); *Re Harrison* (1922), 51 O.L.R. 634. The learned trial Judge has correctly interpreted para. 4(b) of sec. 112(1) in favour of the appellants as meaning in possession of the premises. That is the grammatical interpretation. The goods are still liable to seizure under sec. 112, even although the bank has acquired title, provided that the person taxed is in possession of the land: *Re Electrical Fittings and Foundry Co. Ltd.* (1926), 58 O.L.R. 364, at p. 367; *Attorney-General for Canada v. Attorney-General for Quebec, Silver's Case*, [1929] S.C.R. 557. If the Bank Act does deprive the municipality of the right of distress, that is not banking legislation and therefore *ultra vires*: *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367. What is the proper conclusion on the evidence as to possession? The bank took possession of nothing. It merely appointed an agent to look after its interests at the factory. The bank could not carry on the business. It has no power, legally, to manufacture and sell candy, etc. Goods were manufactured and sold up to the 5th July. The company must have carried on under the supervision only of the bank. Therefore the bank could not have been in actual possession of the premises or chattels on and after the 30th June, as alleged. In any event it must be shewn that the owner is out of possession. There was here, at most, a joint possession by the company and the bank. There is no evidence that the company ever went out of possession. Section 112 of the Assessment Act, subsec. 2, cl. 3, does not operate against the claim of the appellants for business tax, unless the bank had exclusive possession of the goods.

J. W. Bain, K.C., and *Everett Bristol, K.C.*, for the defendants, respondents. The learned trial Judge erred in holding that the respondents were not in possession of the premises and in overlooking cl. 8 of the company's agreement with the respondents. The bank told the company it would have to go out of possession,

and in fact the workmen were dismissed and the premises vacated. The bank then re-hired some of the employees and took actual and exclusive possession of the premises except to give the company the right, as requested, to meet upon and visit the premises. The section of the Assessment Act relied upon by the appellants has no application. As to the constitutionality of the Bank Act, see *Tennant v. Union Bank of Canada*, [1894] A.C. 31, at pp. 45-47. Under secs. 76-94 of the Bank Act, and particularly sec. 88, subsec. 7, and sec. 89, subsec. 3, a bank is given the absolute ownership of the property to the exclusion of any right of seizure by the municipality or any one else. The bank has the right to enter, take possession, and sell. If there is conflict between this right and the right of the municipality under the Assessment Act, the Dominion legislation is to govern and the Provincial Act should be modified to that extent. The bank is in a higher position than the owner of the goods as against the municipality, because its rights arise under the Bank Act, which gives special protection: Falconbridge on Banking and Bills of Exchange, 4th ed., pp. 220, 221.

Edward Bayly, K.C., for the Attorney-General for Ontario. Both Acts are valid. If there is a clash, the Ontario legislation is of course suspended, but there is no such clash here.

Henderson, K.C., in reply. The letter referred to in the evidence and in the judgments should be construed as a request to hold the directors' meetings on the premises of the company, if agreeable—not to the bank—but to the directors themselves. The company had no need to ask permission to hold the directors' meetings on its own premises. There is no indication of intention on the part of the company to abandon possession of its property.

June 20. RIDDELL, J.A.:—The incorporated company, William Paterson & Co., was a customer of the defendant bank; and, falling behind, it, on the 30th June, 1926, gave a security, in form schedule C, under sec. 88 of the Bank Act, to the bank, covering, *inter alia*, the material, etc., in the factory, 23-25 King-street, Brantford. This transaction followed an agreement made on the 27th May, 1928, when the company was requiring advances, in which it was agreed, *inter alia*, that the bank, making advances and the advances being unpaid, might "at any time and from time to time enter into possession of all premises wherein the goods or any of them covered hereby or by any security so given to the bank may be (not being the premises of a warehouseman or carrier), and hold the said premises until such goods shall be fully realised upon and shall have full right of entry, ingress and egress, to and from such premises from time to time, and full power to exclude

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the customer and all other persons therefrom, and for the purpose of taking such possession the bank may break open any doors, bars, gates, or other obstructions." Also that it might "delegate all or any of the powers hereby granted to it to any receiver or other person appointed by it from time to time, and on every appointment by the bank of any receiver or other person he shall, free of charge, have full power to occupy and use when and so often as he may desire the property and premises (real and personal) of the customer or any part or parts thereof."

The company could not continue in business; and, on the 30th June, 1926, wrote the bank as follows:—

"As requested by Mr. Johnston, we have made arrangements for the closing of our plant and office to-night; no further expense will be incurred from now on.

"It is our intention, if agreeable, to hold our directors' meeting on Monday morning next, trusting that other arrangements can be made in the meantime which will enable us to again operate."

This was in accordance with an arrangement made the previous day, the acting agents being Mr. Johnston for the bank and Mr. Edmonds for the company.

Johnston called Dunsheath, the secretary-treasurer of the company, down to the bank, and it was arranged that Dunsheath should act as agent for the bank. The company did shut down, paid off all its employees, including the watchman. Dunsheath on behalf of the bank employed a staff of workers, including a watchman, put a bolt on the door, taking steps to secure the safety of the goods belonging to the bank. Thereafter he carried on the business which the company had abandoned pursuant to its letter of the 30th June, already quoted, himself being in the employ of the bank, and using the bank's funds.

The company was not forbidden to use the building to hold its meeting, mentioned in the said letter, and did hold it accordingly, silence, I presume, giving consent. Dunsheath also allowed two of the former officers of the company to come into the building at will to consult their papers, etc., but there was no pretence that the company or any one else was carrying on the business other than the bank, through its agent Dunsheath.

On these undoubted facts, I am wholly unable to understand the finding of the learned trial Judge that the bank was not in possession of the premises or of the business, but only of the chattels. If such a state of affairs could exist in law, it did not exist in fact in the present case—it is abundantly apparent that the possession of the property, real as well as personal, was in the bank, in fact; and I can see nothing to make it different in law.

This being the state of matters, the Corporation of the City of Brantford, on the 9th July, at an early hour, seized the chattels on the business premises for taxes due by the company; the bank disputing the right to sell these chattels, an interpleader order was made by Mr. Justice Fisher, on the 2nd March, 1927, for the trial of an issue, which was to be defined by pleadings directed to be delivered. Pleadings were accordingly filed, and a sensible arrangement was made for the disposition of the goods in a business way, the rights of all parties being preserved.

The real questions, after denuding the case of the vesture of irrelevant matter with which it was clothed, are of the simplest kind: the city corporation claims that these goods so seized are liable to be sold for the taxes upon the realty and the business tax; the bank, that this would be to deprive it of the rights given it by the Bank Act, under its security, schedule C; and that, if the Ontario statute would have that effect, it is *ultra vires* the Province—then the city corporation says that, if the Bank Act has the effect of removing these goods from the operation of the Assessment Act, it is, *pro tanto*, *ultra vires*.

I am wholly unable to see how there is any real conflict between the Acts in question, when properly interpreted: nor, as I think, are we called upon to decide the point as a *ratio decidendi*. As, however, a great deal of argument was advanced on both sides to shew that there is a conflict between Dominion and Provincial legislation, it will not be amiss to set out what I think to be the real situation.

The Dominion Act undoubtedly vests in a bank, taking a security in the form of schedule C from the owner of goods, the property in such goods; the Provincial legislation nowhere says the contrary. There is nowhere any legislation or other agency making the ownership so obtained any different from the ownership obtained in any other way, as, e.g., by purchase. This ownership obtained through the security has no sanctity, no extra immunity, no special characteristic, and the bank, in respect of such property, is not a kind of super-owner, having rights in the matter of such goods not enjoyed by others in respect of their property, or by itself in respect of its other goods.

The case of *Tennant v. Union Bank of Canada*, [1894] A.C. 31, was pressed on us by counsel for the bank, with the utmost earnestness, as shewing that property so acquired had some extra quality, something in law, which property otherwise acquired had not. Counsel were unable—or, at least, when asked repeatedly to express in language what this mysterious extra quality is, failed—to give it a name or a description. The case of *Tennant v. Union*

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Bank of Canada gives no colour to such a proposition. There, the bank claimed under a warehouse receipt which the existing Bank Act authorised it to take, and which by the same Act was given validity; it was said that Provincial legislation, R.S.O. 1897, ch. 122, did not justify this, as the warehouse receipt in question did not comply with the requirements of the statute. The Judicial Committee held that the Provincial statute was ineffective to prevent the operation of the warehouse receipt as provided by the Dominion Act. But that was the whole substance of the decision; there was no indication in the judgment that the property so validly acquired was, when acquired, in any different position from the other property of the bank, however acquired.

In the present case, counsel failed to indicate any legislation of the Province which, in the slightest degree interfered with the full operation of the security in vesting the property in the bank, as stated in the Bank Act.

To put the matter concisely: the Dominion Act vests the property in the bank, and the Provincial Acts do not purport to prevent this; the Provincial Acts made no distinction between property thus acquired by the bank and other its property, and the Dominion Act does not provide that there shall be any distinction.

If there is anything in the reasons for the judgment appealed from that is not consistent with this, it cannot be supported.

To turn to the particular facts of this case, and the law applicable thereto, the Ontario legislation that comes in question is the Assessment Act, R.S.O. 1927, ch. 238, sec. 112, and more particularly the proviso following sec. 112, subsec. 1, para. 4(*d*):—

“Provided that where the person taxed or such owner is not in possession, goods and chattels on the land not belonging to the person taxed or to such owner, shall not be subject to seizure. . . .”

I accede to the argument of counsel for the city corporation that, in view of sec. 112, subsec. 1, para. 1, interpreting the words “the person taxed,” this means that the exemption applies only if the owner of the land is not in possession, even in joint possession, and I am prepared, as at present advised, to hold that if the owner—here the company—was even in joint possession and was not in fact and in law actually excluded from—in the sense of being wholly out of—possession, the section would not apply.

Here, I think that the bank was in actual—and that is what is contemplated by the statute—possession, to the exclusion of the company; that, therefore, the company was “not in possession” within the meaning of this proviso.

The question then really is, were these chattels, so seized, chattels “not belonging to the person taxed or . . . owner?”

The Dominion legislation, R.S.C. 1927, ch. 12, sec. 88(6), gives the bank power to take a security in the form here in question; and by subsec. 7 provides that "the bank shall by virtue of such security, acquire the same rights and powers in respect of the . . . goods . . . as if it had acquired the same by virtue of a warehouse receipt. . . ."

For all purposes of the present case, this means that the bank acquires the property in the goods, which the person giving the security himself had, that is, the person giving the security having the ownership of the goods, the bank by this security becomes itself the owner. Such being the case, I am of opinion that the proviso already quoted applies; and that the city corporation had no right to take these chattels of the bank to pay the taxes of the company any more than it had the right to take the furnishings of the bank-building for the same purpose. The above will dispose of the case so far as it relates to the taxes on the land; admittedly the claim of the city corporation for the business tax stands on weaker ground; there can be no valid ground for placing it any higher.

I would dismiss the appeal on wholly different grounds from those in the Court below, and the appellants should pay the costs of the respondents. As to the costs of the Attorney-General, he was brought in by the city corporation because compelled so to do by the pleading of the bank; and the bank should pay any costs of this proceeding, including the costs of the Attorney-General in this Court.

LATCHFORD, C.J., agreed with RIDDELL, J.A.

MASTEN, J.A.:—Immediately after the argument of this appeal, I prepared certain notes of judgment, but while they were still in the form of an uncompleted draft I had the opportunity of perusing the reasons which had already been prepared by my brother Riddell. He has stated the facts with his usual accuracy and clearness, so that it becomes unnecessary and therefore undesirable for me to re-state them.

I agree with the finding of fact by my brother leading to the conclusion that the bank "was in actual possession (of the premises as well as the goods) to the exclusion of the company," and that therefore the company was not in possession within the meaning of the Assessment Act, R.S.O. 1914, ch. 195, sec. 109, subsec. 1, cl. 4 (d). Upon the facts here in evidence, the governing provision is the following proviso at the end of cl. 4—"Provided that where the person taxed or such owner is not in possession, goods

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and chattels on the land not belonging to the person taxed or to such owner, shall not be subject to seizure."

The bank was in exclusive possession of both goods and premises. The debtor company was not in joint possession, and under the provisions of the Bank Act and the terms of their security the property which the appellants attempted to seize had passed absolutely to the bank.

I cannot usefully add anything further to what has been said by my brother Riddell on that branch of the case.

I desire, however, to make an observation regarding the question dealt with by the learned trial Judge upon which he held that the security of the bank taken under sec. 88 of the Bank Act was immune from seizure for municipal taxes. With the utmost respect, I am unable to agree with the view so expressed in the Court below. Notwithstanding the fact that the bank is incorporated by Dominion legislation and that the subject of banks and banking is by the British North America Act specifically and exclusively reserved to the Dominion authority, and notwithstanding the fact that it is clear, having regard to decided cases of which *John Deere Plow Co. Ltd. v. Wharton*, [1915] A.C. 330, is an example, that the Provincial authority cannot limit the capacity or interfere with the operation of the bank in the conduct of its banking business, yet, on the other hand, the bank is bound by all existing laws competently enacted by the Provincial Legislature, examples of which are afforded by the well-known cases of *Colonial Building and Investment Association v. Attorney-General of Quebec* (1883), 9 App. Cas. 157, at p. 164; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; and *Bank of Toronto v. Lambe*, 12 App. Cas. 575.

I think that it is within the power of the Provincial Legislature to impose direct taxation throughout the Province and to delegate that power to the municipalities of the Province. The jurisdiction to tax carries with it as incidental and collateral thereto the right to regulate the priorities as between the taxing authority on the one hand and creditors (secured or otherwise) on the other.

The present case in my opinion falls within the principle illustrated by *Bank of Toronto v. Lambe* and not under that illustrated by the *John Deere Plow Co.'s* case.

I have no doubt but that the Legislature of Ontario has power to impose taxes on a bank and to authorise the municipal authorities to assess and levy municipal taxes against banks and against property held by them.

I would, therefore, dismiss this appeal, on the ground that the personal property seized was at the time of the seizure in the possession of the bank and located on premises of which it was in the possession; that the attempted seizure for taxes was invalid under the provisions of the Assessment Act; and I would reverse the finding of the trial Judge on the constitutional question discussed by him.

Costs will follow the result; the bank to pay the costs of the Attorney-General.

ORDE, J.A.:—I agree with the judgment of my brother Masten. I think the evidence clearly establishes that the bank was in the exclusive possession of both the goods and the premises before the city corporation seized for the taxes.

I also agree that the learned trial Judge is in error in his opinion that sec. 88 of the Bank Act prevails over sec. 109 of the Ontario Assessment Act, R.S.O. 1914, ch. 190. It is unnecessary for the purpose of this case to discuss this question at length, but there must be a very broad line of distinction drawn between Provincial legislation which affects the validity of securities based upon the provisions of the Bank Act, and Provincial legislation passed under the Provincial power to impose taxes and which as taxing statutes can have no bearing at all upon the validity of such securities.

FISHER, J.A., agreed with RIDDELL, J.A.

Appeal dismissed.

[APPELLATE DIVISION.]

BONN V. NATIONAL TRUST CO. LTD.

1930.

Jan. 18
June 20.

Judgment—Foreign Judgment against Foreign Administrator of Estate of Maker of Promissory Note—Action in Ontario upon Judgment Brought against Ontario Administrator—Want of Privity—Action in Personam—Uncertainty of Sum Recovered—Extent of Assets of Estate.

Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shewn to be invalid.

Where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for in contemplation of law there is no privity between him and the other administrator.

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These rules, taken from Dicey and Story's works on Conflict of Laws, were adopted and applied in an action brought in Ontario upon a foreign judgment recovered against the foreign administrator of a deceased person, the Ontario action being against an Ontario administrator; and the Ontario action was dismissed.

Per MASTEN and ORDE, J.J.A.:—The foreign judgment here was not a judgment *in rem*, but a judgment *in personam*—the effective distinction between the two pointed out.

A foreign judgment must be for a sum certain; and a judgment against a person as administrator cannot be for a sum certain, because the sum named in the judgment is to be levied out of the property of the intestate in the hands of the administrator, "if he hath so much thereof in his hands to be administered."

ACTION on a judgment recovered in the State of New York. The defendant company was sued as administrator in Ontario of the estate of Minnie Morris, deceased.

The action was tried before RANEY, J., without a jury, at a Hamilton sittings.

S. R. Jefferess, for the plaintiff.

W. Schreiber, for the defendant company.

Thomas Hobson, for the Official Guardian.

January 18. RANEY, J.:—The plaintiff's claim in the New York action was on a promissory note said to have been made by Minnie Morris, since deceased, dated the 7th August, 1922.

Minnie Morris died in the city of Detroit, Michigan, on the 6th December, 1926, intestate. Her husband, Max Morris, of the city of Rochester, in the State of New York, later in the same month applied there for letters of administration of her estate, and letters of administration were granted to him on the 14th December, 1926. In the husband's petition for the grant it was recited that the amount of the personal estate did not exceed \$10,000, and that there was no real estate.

In January, 1928, this plaintiff brought an action against the husband, as administrator, in the Supreme Court of the State of New York; and, the case having come on for trial at Rochester before a jury, on the 12th June, 1928, a verdict was rendered and judgment pronounced in favour of the plaintiff for the amount of the promissory note, with interest and costs, making a total of \$6,951.18. From this judgment an appeal was taken by the administrator, which was dismissed on the 25th September, 1928, for want of prosecution. These proceedings were verified by exemplifications of the judgment of the Court delivered in June and of the order dismissing the administrator's appeal.

At the instance of an Ontario creditor of Minnie Morris, letters of administration of her estate were granted by the Surrogate Court of the County of Wentworth, on the 16th February, 1927,

to the defendant company; and this action was brought against it upon the foreign judgment.

The only witness called by counsel for the plaintiff at the trial was the plaintiff himself, and the only important evidence given by him was that his claim was not paid. For the defence it was established that the letters of administration had been granted to the trust company at the instance of one Goldberg, claiming to be a creditor of Minnie Morris; that the assets in Ontario consisted of a mortgage on certain Hamilton property for about \$8,000; that at the time of the granting of the letters of administration here the trust company knew nothing about the letters of administration in the State of New York, and did not learn that administration had been granted there until January, 1929.

The question for determination is: Is the judgment of the New York Court a judgment that will ground an action in a court of this Province? The answer to that question depends upon whether or not there was jurisdiction in the New York courts, first to grant the letters of administration, and, secondly, to entertain the plaintiff's action there.

The general rule of international jurisprudence governing jurisdiction of the courts is that the plaintiff must sue in the court to which the defendant is subject at the time of the suit. All jurisdiction is territorial, and territorial jurisdiction attaches to persons either permanently or temporarily resident within the territory while they are within it, but does not follow them when they have withdrawn from it. In questions of succession governed by domicile, jurisdiction may exist as to persons domiciled, or who when living were domiciled, within the territory, but no territorial legislation can give jurisdiction which any foreign court ought to recognise against persons who owe no allegiance or obedience to the power which so legislates: *per* the Earl of Selborne in *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A.C. 670.

Applying these tests, would the New York court have had jurisdiction to entertain an action by the present plaintiff on his promissory note against Minnie Morris in her lifetime? There is no evidence that she was a resident of the State of New York after (or even before) the note was made. True, the New York letters of administration describe her as "late of the city of Rochester, in the county of Munro and State of New York," but the Ontario letters of administration describe her as "late of the city of Detroit, in the county of Wayne, in the State of Michigan." Neither recital is, of course, evidence of the fact in this action. If Minnie Morris was not a resident of the State of New York after the mak-

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ing of the note, then the New York court would have had no jurisdiction to entertain an action on this note against her during her lifetime. If there was no jurisdiction in Minnie Morris's lifetime, there would be none afterwards, unless, at all events, her administrator was possessed of assets of her estate in the State of New York.

As to the question of the jurisdiction of the New York court to grant administration if Minnie Morris was not a resident of New York at her death, what was there to ground jurisdiction of a New York court to grant administration of her estate? There was no evidence before me as to what, if any, property was owned by her in the State of New York.

The action fails for lack of evidence of facts to support the jurisdiction of the New York courts either to grant administration of the estate of Minnie Morris or to entertain the plaintiff's action against the New York administrator on the promissory note.

The action is dismissed with costs.

The plaintiff appealed from the judgment of RANEY, J.

June 5. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

G. W. Mason, K.C., and Jefferess, for the appellant, argued that the present defendant could be held liable in this action, which is based on a judgment against the New York administrator, because the two administrators represent the same interest: *Re Law* (1915), 34 O.L.R. 222; *Re Scatterd* (1918), 15 O.W.N. 222.

D. L. McCarthy, K.C., and Schreiber, for the defendant company, respondent, contended that the action did not lie against the Ontario administrator, because there was no privity between the appellant and it. The two administrators were distinct and separate persons, and a judgment against one was not a judgment *in personam* and did not affect the other: *In re Lorillard, Griffiths v. Catforth*, [1922] 2 Ch. 638; Spencer Bower's *Res Judicata*, p. 128; *Rio Tinto Copper Co. v. Société des Métaux* (1890), 6 Times L.R. 408.

Mason, K.C., in reply, referred to the *Lorillard* case, at p. 646.

June 20. RIDDELL, J.A.:—This is an appeal from the judgment at the trial of Mr. Justice Raney, the important facts being given in that learned Judge's reasons for judgment, *supra*.

I do not agree with the conclusion of the trial Judge as to the judgment of the New York court, apparently based upon the

proposition, "There is no evidence that she" (the deceased maker of the note) "was a resident of the State of New York after (or even before) the note was made."

The rule is well settled that any foreign judgment is presumed to be a valid foreign judgment unless and until it is shewn to be invalid: Dicey, Conflict of Laws, 3rd ed., p. 444, rules 111 and 112. The learned Judge has placed the onus on the wrong party. But the difficulty in the plaintiff's way is that the foreign judgment is not against the present defendant, but against another. The fact that the two defendants happen to be both administrators of the estate (or some part of it) has no more significance than if they had happened to be members of the same secret society.

The rule in this regard is laid down correctly by Story, Conflict of Laws, 8th ed., p. 739, in sec. 522, thus:—

"Relation between Different Administrations.—Where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for in contemplation of law there is no privity between him and the other administrator."

While no English case is cited in support of this proposition, there has been found no decision adverse to it, and I am of opinion that our law is as stated. Bigelow on Estoppel, 6th ed., p. 347, may also be referred to.

Such being the law, there is no ground for holding the present defendant liable in an action based solely upon a judgment against another. Whether the plaintiff here has some other rights or some other method of having the debt paid out of the estate of the defendant, we need not inquire; we do not prevent any other action or proceeding being taken as the plaintiff may be advised.

The appeal will be dismissed with costs.

LATCHFORD, C.J., agreed with RIDDELL, J.A.

MASTEN, J.A.:—This was an appeal by the plaintiff from the judgment of Raney, J., dismissing the action with costs.

The plaintiff sues the defendant as administrator in Ontario of the estate of one Minnie Morris, deceased, to recover the sum of \$6,951.18. The claim is based on a judgment which the plaintiff recovered on or about the 21st day of June, 1928, in an action in the Supreme Court of the State of New York, County of Munro, in which action the present plaintiff was plaintiff, and one

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In that action it was "adjudged that the plaintiff John Bonn recover of the defendant Max Morris, as administrator of the estate of Minnie Morris, deceased, the sum of \$6,821.75 damages, and in addition thereto the sum of \$129.43 costs as taxed by the clerk, amounting in all to the sum of \$6,951.18, and that he have execution therefor."

In the present action the trial Judge held that the plaintiff had failed to satisfy the onus that rested upon him. In concluding his judgment he says: "The action fails for lack of evidence of facts to support the jurisdiction of the New York courts either to grant administration of the estate of Minnie Morris or to maintain the plaintiff's action against the New York administrator on the promissory note."

With the greatest respect for the trial Judge, I am unable to agree with the view so expressed by him. As long ago as 1867 it was held in the case of *Manning v. Thompson*, 17 U.C.C.P. 606, that "in an action on a foreign judgment, if the judgment is not impeached or denied, it is *primâ facie* evidence against the defendant . . . and the *onus probandi* was upon defendant, who ought to have begun, and that having refused to do so, a verdict was properly entered for the plaintiff."

In that case the cause was tried at the Assizes at Guelph before the Chief Justice of the Common Pleas. The question arose as to who ought to begin. The learned Chief Justice ruled that the defendant ought to begin as the issue was on him. Counsel for the defendant objected, and would not begin, whereupon the jury were directed to find for the plaintiffs for the amount of the judgment, and leave was reserved to the defendant to move for misdirection in the above respect. The appeal came on for hearing before the Court of Common Pleas, Richards, C.J., Adam Wilson, J., and John Wilson, J., who dismissed the appeal, basing their judgment largely on the case of *Bank of Australasia v. Nias* (1851), 16 Q.B. 717, 736. I am unable to find that the conclusion so reached in that case has ever been reversed or even criticised in the Courts of Ontario, and it accords with the rule as expressed in Dicey on the Conflict of Laws, 4th ed. p. 449:—

"Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shewn to be invalid."

But though this difficulty is removed from the plaintiff's way, other difficulties of a more serious nature remain.

The judgment in the Supreme Court of New York State was recovered against Max Morris, only as administrator within that

State of the estate of Minnie Morris, deceased, and the present action is not against Max Morris, but against the National Trust Company, administrator of the estate of Minnie Morris in the Province of Ontario. Thus the actions are against two entirely distinct persons. The present defendant was not a party to the action in the Supreme Court of New York.

On that point the Privy Council have expressed the rule as follows:—

“A foreign judgment of a competent Court may indeed be impeached, if it carries on the face of it a manifest error; if it is shewn to have been obtained by fraud, or to be wanting in the conditions of natural justice; and it cannot be applied to persons other than those who were parties to the litigation decided by it, except in cases where the judgment is *in rem*.” *Messina v. Petrocochino* (1872), L.R. 4 P.C. 144, at p. 157.

The present judgment is not a judgment *in rem*, but a judgment *in personam*. The distinction between a judgment *in rem* and a judgment *in personam* is very admirably expressed in Dicey, 4th ed., p. 451:—

“The difference between judgments *in personam* and judgments *in rem*, or as to status, lies not in their conclusiveness as to the matter which they decide, but in the nature of the matter which they must be taken to have decided, and as to which, therefore, alone they are conclusive. When a Court pronounces a judgment *in personam*, it decides only that A has a given right against X, e.g., a right to the payment of £20 by X: the judgment, therefore, is conclusive only as between A and X, or their representatives. When a Court, on the other hand, pronounces a judgment *in rem*, it determines the title to a thing, e.g., a ship, not as between A and X, but as regards A against all the world. The judgment, therefore, is conclusive against the whole world.”

For these reasons I agree with the conclusion which has already been stated by my brother Riddell in the judgment prepared by him, namely, that the plaintiff must fail because the present defendant was not a party to the New York action.

But there is a further ground on which the plaintiff's action in my opinion fails. It is a well-settled rule with regard to a foreign judgment, that the judgment must be for a sum certain, and this present judgment is not, in my view, for a sum certain. In the case of *Sadler v. Robins* (1808), 1 Camp. 253, the defendant had been ordered to pay a certain sum on a certain day, first deducting thereout the defendant's costs, to be taxed by the proper officer. The costs had not been taxed. Lord Ellenborough, Chief Justice, said: “The sum due on the decree is quite indefinite . . .

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and cannot be gone through here. . . . Had the decree been perfected, I would have given effect to it;" and very recently in the case of *M'Donnell v. M'Donnell*, [1921] 2 I.R. 148, a similar conclusion was reached. In that case, by an order of a foreign Court made in an action in which a wife sued her husband for support and maintenance, the husband was ordered to pay into court a specified sum per month for the support and maintenance of his wife, such payments to be made until further order of the Court. In an action in another jurisdiction by the wife against the executor of her husband for arrears due under the order, it was held that the order was not such a final and conclusive judgment as to be enforceable by Irish courts.

In the present case the judgment in the New York court was against "Max Morris as administrator of the estate of Minnie Morris, deceased."

In the absence of evidence to the contrary, it must be assumed that this judgment possesses the same meaning as the fuller form customarily adopted in the courts of Ontario, namely, "that the plaintiff do recover against the defendant, as administrator of the assets and effects of Minnie Morris, deceased, the sum of," etc., "to be levied out of the property which was of the said Minnie Morris at the time of her death, in the hands of the said Max Morris as her administrator as aforesaid, to be administered if he hath so much thereof in his hands to be administered."

Manifestly such a judgment is not a judgment for a sum certain, and therefore on that ground also it appears to me that the plaintiff must fail.

For these reasons, while unable to support the view which was entertained by the trial Judge, I think that the result must be that the appeal should be dismissed with costs.

ORDE, J.A., agreed with MASTEN, J.A.

FISHER, J.A., agreed with RIDDELL, J.A.

Appeal dismissed.

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WOLVERINE STEAMSHIP CO. v. CANADIAN DREDGING CO. LTD.

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June 21.

Ship—Arrest of—Mooring in Safe Berth in Canal—Change of Berth Effected by Trespasser—Conditional Permission of Harbour Master—Undertaking to Return—Authority of Harbour Master—Agent of Crown—Bailment—Negligence—Contributory Negligence—Apportionment of Damages.

The plaintiff company's ship, having been arrested by the Crown, in the Welland canal, to answer a claim by the Crown for damage done to a bridge, was, with the consent of the master and the assistance of the crew, laid up for the winter of 1928-29 in a small bay on the east side of the canal, where she was securely moored and sheltered from the winds, a ship-keeper being left aboard by the plaintiff company. In January, 1929, the defendant company shifted the ship and moored her on the west side of the canal, without the knowledge or consent of the plaintiff company or of any officer or member of the crew except the ship-keeper, and solely for the convenience of the defendant company, which needed the berth on the east side for a dump. Permission was obtained from the Harbour Master to move the ship, but upon the undertaking of the defendant company to return her to her original berth. The ship was not moored securely in her new berth—the defendant company did not allow sufficient slack for the rise of the water in the canal under the influence of the prevailing west and south-west winds on Lake Erie. The defendant company did not return her to her original mooring; and on the 1st April, 1929, her lines and cables were snapped when the water in the canal, under the influence of a strong south-west wind, rose some 4 to 6 feet. She then broke from her moorings and suffered damage to the extent of \$2,954:—*Held*, upon the evidence, that the berth on the west side of the canal was a more exposed and more dangerous berth than that on the east side; the onus of proving that the new berth was safe and the ship securely moored was on the defendant company; and that onus it had failed to satisfy.

There was no contract either expressed or implied between the plaintiff and defendant companies—the only contract was between the Harbour Master and the defendant company as stated; and *quære* whether it was within the authority of the Harbour Master, who had control of the ships in the harbour for navigation purposes, to give permission to move the ship, when she was *in custodia legis*, without the consent of or without notification to the plaintiff company. He was acting as a bailiff of the Crown from a revenue standpoint, and in that sense had possession of the ship, and his duty was to keep it safely: *Carr v. Smith* (1924), 26 O.W.N. 349.

If the defendant company was a bailee from the Crown, through its agent, the Harbour Master, the bailment was for the sole benefit of the bailee, and it was liable for the slightest negligence.

In the circumstances, while the asportation may have been lawful as against the plaintiff company owing to the possession being in the Crown and the agent of the Crown consenting, there was a trespass in not returning the ship to its original berth.

In any view of the relations between the parties, the defendant company's duty was to keep the ship safely—this, by reason of negligence, it did not do, and was therefore liable in damages.

There was contributory negligence of the ship-keeper in not observing that the lines were too taut in the event of the water rising and slacking them off to allow for it, and for that negligence the

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plaintiff company was responsible to the extent of 25 per cent.; and the damages were apportioned accordingly.

AN action for damages for wrongfully removing the plaintiff company's ship "Griffin" from its mooring place in the Welland canal and mooring it in another place from which it broke away and was injured.

The action was tried before LOGIE, J., without a jury, at Welland.

L. B. Spencer, K.C., for the plaintiff company.

F. Grant and W. A. Robinson, for the defendant company.

June 21. LOGIE, J.:—The ship "Griffin" had been arrested or seized by the Crown, under the regulations governing navigation, in the Welland canal, to answer a claim by the Crown against the owners for alleged damage done to a bridge which crosses the canal. It was then very close to the end of the navigating season, and, with the consent and assistance of the master and crew, she was laid up for the winter of 1928-29 at Ramey's Bend in the Welland canal, on the east side of the canal, but on the west side of what is known as the "Island," and was securely moored and sheltered from the winds in a small bight or bay. The mooring lines were amply sufficient so long as she remained moored where the plaintiff company left her. There was a ship-keeper or watchman left aboard the "Griffin" by the plaintiff company. On or about the 21st January, 1929, the defendant company, with its tug and workmen, shifted the "Griffin" about 200 feet to the southward and across the canal, and there moored her on the west side of the canal. The shifting and mooring were done without the knowledge or consent of the plaintiff company or of any officer or member of the crew of the "Griffin" except the ship-keeper or watchman, and solely for the convenience of the defendant company, which wanted the berth formerly occupied by the "Griffin" on the east side of the canal, for a dump. The defendant company obtained permission from the Harbour Master to move the "Griffin," but undertook with him to return her to her original berth. The steamer was not moored securely or in a seamanlike manner in her new berth, but was moored negligently and inefficiently in this, that the defendant company did not allow sufficient slack for the rise of the water in the canal under the influence of the prevailing west and south-west winds on Lake Erie. The defendant company did not return her to her original mooring, as it had undertaken with the Harbour Master to do.

There is no direct evidence as to how the steamer broke away, but I find as a fact, and in the course of the trial it was in effect

conceded, that her lines and cables were snapped when the water in the canal rose under the influence of a strong south-west wind on the 1st April, 1929, a matter of some 4 feet to 6 feet. She then broke from her moorings and suffered damage to her plates to the extent of \$2,954. I find as a fact that the berth on the west side of the canal was a more exposed and more dangerous berth than that on the east side. The excuse given by McAuley, a witness for the defendant company, for not returning her, that she could not be brought back to her original position because of the uncertainty of the state of the bottom of the canal after the defendant company had dumped rocks from scows in the original berth, is not borne out by the evidence, and in any event is not material, because the defendant company gave an unqualified undertaking to return her to her original berth.

The onus of proving that the new berth was safe and the ship securely moored was on the defendant company. The witnesses for the defendant company were unable to give any satisfactory evidence as to how the "Griffin" was moored after being moved to the west side of the canal, except to say that the same number of lines were out as were on the east side of the canal and one additional line forward. There was no evidence as to the length of the leads fore and aft or the amount of slack allowed. Captain Reid, a most experienced seaman and shore captain, whose evidence I accept, convinced me that the above are the two important factors in mooring a boat. The evidence also established beyond doubt that on the west side of the canal the problem of mooring the ship would have to be much more carefully studied than on the east side; and, although the defendant company alleged that some of the cables were none too good, Captain Gallagher, the plaintiff company's employee and officer, said that they were in good condition, and both he and the Harbour Master were quite satisfied with them when the "Griffin" was moored in her original berth. The reason for this is obvious, as the witnesses stated. All the heavy storms come from the south or south-west, and, if moored on the east side, the wind would hold the ship against the canal-wall without damage and without any strain on the ropes and cables. On the west side the converse is the case.

It is difficult to set forth the relationship of the defendant company to the plaintiff company in law, or to determine under what category the action would fall to be placed in the old style of pleading. Bailment is a matter of contract, express or implied, and there was no contract either express or implied between the plaintiff and defendant companies.

As between the Government authorities responsible for con-

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structing the canal and the plaintiff company, there was no contract express or implied, and no evidence that the chief engineer, or any other responsible official having authority to order a ship not under steam but merely lying in the canal to be moved, gave any instructions or authorisation to the defendant company at all. The only contract was between the Harbour Master and the defendant company, and that was that the defendant company was authorised to move the ship but was to return it after the dumping operations were over to its original berth.

It is very doubtful and there is no evidence to shew that it was within the authority of the Harbour Master, who had control of the ships for navigation purposes, to give permission, when she was *in custodiâ legis*, to move the ship without the consent of or at all events without notification to the plaintiff company.

The Harbour Master, so far as the evidence goes, was not interested in the construction of the canal or in whether the ship was or was not moved for construction purposes. So far as the evidence goes, he had no authority to permit what he did. He was interested in the movement of ships through the canal and in the berthing of ships, but he was interested in another capacity. He was acting as a bailiff of the Crown from a revenue standpoint, and had in that sense possession of the ship, but for that purpose only, and his duty was to keep it safely: *Carr v. Smith* (1924), 26 O.W.N. 349.

Certainly the defendant company was not a bailee of the plaintiff company. It may have been a bailee from the Harbour Master, in his capacity as bailiff of the Crown, which had arrested or seized the ship. No doubt the Harbour Master could have authorised the shifting of the ship if there was danger to navigation or danger to the ship itself, but the title to the boat was in the plaintiff company, and, if the defendant company was a bailee from the Crown, through its agent, the Harbour Master, the bailment was for the sole benefit of the bailee, and the bailee is liable for the slightest negligence: *Coggs v. Bernard* (1703), 2 Ld. Raym. 909, 3 Ld. Raym. 163; and the onus is on the bailee to shew that he took proper care: *Goldman v. Hill* (1918), 34 Times L.R. 486.

If the bailee takes the thing bailed to a place where he is not entitled to take it, and it is injured there even without his fault, he is liable unless he can shew that such damage would have occurred no matter where the thing was: *Lilley v. Doubleday* (1881), 7 Q.B.D. 510; *Lampson and Co. v. London and India Dock Joint Co.* (1901), 17 Times L.R. 663. This the defendant company failed to do.

Now, as between the Crown and the defendant company, although the bailee took the ship to a place to which he was authorised to take it, he left it in a place where he was not entitled or authorised to leave it, and it was injured in that place.

It is clear that he who actually damages a chattel belonging to another, whether indirectly by reason of his negligence or directly by some act done to the chattel in the nature of a trespass, is guilty of a wrong. There may be a trespass without the infliction of any material damage by a mere taking or asportation. For instance, the removal of a chattel from one room to another without any authority, express or implied, from the circumstances, may afford a good cause of action although but for nominal damages: *Kirk v. Gregory* (1876), 1 Ex. D. 55. For the taking to constitute a trespass, however, it must not merely be an unlawful act but unlawful as against the party from whom possession is taken: *Balme v. Hutton* (1833), 9 Bing. 471, at p. 477; and I am of opinion that under the circumstances of this case, while the asportation may have been lawful as against the plaintiff company owing to the possession being in the Crown and the agent of the Crown consenting, there was a trespass in not returning the ship to its original berth.

But, whatever the real relations in law are between the plaintiff company, the defendant company, and the Crown, there is no real difference as to what the legal duty of the defendant company was. It assumed custody of the ship without colour of right and for its own purposes so far as the plaintiff company was concerned, and, if not an insurer, its duty at the lowest, having removed the ship from a safe berth to an unsafe berth, was to keep it safely. This, owing to negligence, it did not do, and I think it is liable for the damages.

Whether there was any contributory negligence on the part of the plaintiff company is difficult to decide. Captain Gallagher said that the ship-keeper was just a watchman against thieves and the like; that he had no authority to consent to moving from one berth or to suggest any other berth, and had nothing to do with the security of the moorings, except perhaps to replace a rope which broke. In cross-examination he said that his duty in an emergency was to do his best, to use his best judgment, and to notify his employers, and later on he said that his duties were to take care of the lines, to loose off or tauten as required.

Captain Reid, whose evidence I accept in its entirety, said that the ship-keeper's duty is to watch the lines and to slack where there is rising water *when he can*, i.e. when he is able to do so; but, he said, he cannot do anything by himself alone, because,

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owing to the tonnage of the ship (3,000 tons), he could not control the braking of the winch by himself, and that 10 or 20 feet of cable might easily slip out before he could apply the brake, and this would cause such an additional strain, in the emergency which confronted this particular watchman, that the other lines would snap one by one. He further added that the watchman had no responsibility as to the original mooring.

The defendant company says that the ship-keeper or watchman not only consented to the change in the mooring but actually asked for it. I find that he had no authority either to consent to the change of mooring, or much less to demand it, for his personal convenience or comfort.

Again, it is urged that the watchman should have anticipated the rise in water, and during the time which elapsed, some two months, between the mooring on the west side and the storm of the 1st April, he might have made and ought to have made, in this space of time, the necessary adjustments in the lines or cables.

I think that there was some responsibility imposed upon him in this respect. When the emergency occurred, he was, of course, unable to do anything, as is conclusively proven by Captain Reid's evidence, but prior to that I think he ought to have observed that the lines were too taut in the event of the water rising, and ought to have slacked them off to allow for it.

The plaintiff company's contributory negligence in this respect is not, however, nearly as great as that of the defendant company, which carried out the original mooring; and, if I fix it at 25 per cent., I think I am making a liberal allowance.

There will be judgment, therefore, for the plaintiff company for \$2,216, with costs.

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BROWNLEE V. HAND FIREWORK CO. LTD.

June 23.

Negligence—Injury to Person Setting off Firework by Explosion—Action against Company Supplying Dangerous Article—Absence of Privity—Findings of Jury—Specific Acts of Negligence—Negating of other Negligence—Findings Set aside and Action Dismissed.

The plaintiff was seriously injured by the explosion of a bomb or mine which he was setting off at a firework display. The mine was supplied by the defendant company, a manufacturer of fireworks, pursuant to a contract with a society holding the display; and the plaintiff, a stranger to the contract, had been instructed,

in regard to the setting off, by an expert sent by the company. The plaintiff, alleging that the injuries sustained by him were caused by the negligence of the company, brought this action for damages; at the trial the jury found that the injuries were caused by the negligence of the company; and, in answer to a question as to what the negligence was, stated: "We believe that this mine according to evidence was defective as it didn't give the results as expected." In explanation of this answer, the jury stated: "We find that the mortar should have had a larger base and also a time-fuse attached to mine, and also the mine didn't explode and throw stars from 20 to 50 feet as should of (*sic*) done according to evidence:"—

Held, that the finding in regard to the mortar was pure speculation, without any foundation in the evidence; the finding that there should have been a time-fuse was not a finding of such negligence as would in law render the company liable in damages to the plaintiff; and the failure to throw up stars could not be deemed to have caused the plaintiff's injuries.

The fuse furnished by the company was the fuse in general use by all manufacturers of fireworks for displays, and there was no suggestion in the evidence to the contrary.

The jury by their answers had negated as a ground of negligence failure by the expert to supervise or himself to set off the mine (MAGEE, J.A., *contra*).

Where the vendor of a chattel which belongs to the dangerous class delivers it with a proper warning to the recipient, he owes no further duty to the person who receives it from the recipient, nor, where the danger is apparent on the face of the thing, does he owe a greater duty with regard to the manufacture of the article than if it was not a dangerous thing in itself.

Blacker v. Lake and Elliott Ltd. (1912), 106 L.T.R. 533, applied.

The company, in supplying the fuse, which was an instantaneous one, could not be said to have failed to exercise reasonable care in the circumstances, and was not therein guilty of negligence in law. The findings of the jury as to the fuse and the base of the mortar were not sufficient to support a judgment for the plaintiff; and the action should be dismissed (MAGEE, J.A., *dubitante*).

Per MAGEE, J.A.:—The jury have not clearly specified an act or omission for which on the evidence the company should be found liable, whatever may have been in their minds. It would be more satisfactory to order a new trial in a case of such serious injury; but it is not clear upon the evidence that the company was at fault.

AN appeal by the defendant company from the judgment of WRIGHT, J., after trial of the action with a jury, upon the findings of the jury, in favour of the plaintiff for the recovery of \$2,000 damages. The plaintiff, in setting off, at a display, a bomb or mine supplied by the defendant company, was injured by the mine exploding. The jury found that it was defectively constructed.

April 29 and 30. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

C. W. R. Bowlby and W. Eric Griffin, for the appellant company. The finding of the jury that the mine should have had a larger base and also should have had a time-fuse is not a finding of negligence in law. The only duty of the appellant company was to warn and instruct the plaintiff: *Blacker v. Lake and*

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App. Div. *Elliott Ltd.* (1912), 106 L.T.R. 533, at p. 541. Assuming that
1930. the precautions suggested by the jury would (if taken) have
averted the accident, the appellant company is not liable because
BROWNLEE there was no duty to use the safest possible device, and the evi-
v. dence shews that the mine was of the only type used by either
HAND the appellant or any other fireworks company: *Beven on Negli-*
FIREWORK gence, 4th ed., p. 766-9; *Crafter v. Metropolitan Railway Co.*
Co. LTD. (1866), L.R. 1 C.P. 300; *Elliott v. Toronto Transportation Com-*
mission (1926), 59 O.L.R. 609. In any event, the evidence shews
that the real cause of the accident was the plaintiff's own act in
mishandling with gross negligence the fireworks, and the jury
could not reasonably have found otherwise: *Bates v. Batey & Co.*
Ltd., [1913] 3 K.B. 351.

N. R. Robertson, for the plaintiff, respondent. He was not a
servant or agent of the appellant company. The fireworks were
supplied by the appellant company as part of the whole display
of the local musical society, having in contemplation that some
person or persons, of whom the plaintiff eventually turned out to
be one, would volunteer to assist. The article was supplied for a
specific purpose and was defective for that purpose: *McArthur*
v. Dominion Cartridge Co., [1905] A.C. 72; *Dominion Natural*
Gas Co. Ltd. v. Collins and Perkins, [1909] A.C. 640; *Parry v.*
Smith (1879), 4 C.P.D. 325; *Dixon v. Bell* (1816), 5 M. & S. 198.
When an inherently dangerous article of this kind is supplied, the
duty of making it fool-proof is imposed. A latent defect can only
be detected by failure of the article to do what was expected of it.
The finding of the jury on this point—that it did not shoot up
stars as it should have—shews that they were of the opinion that
the bomb was defective and that the defect which they could not
designate precisely was the proximate cause of the accident. A
larger base would have prevented any possible swaying of the
container. If the respondent's story is true and he followed the
instructions given, then the accident must have been because of
the swaying of the mouth of the mortar. The evidence of the
respondent and his witnesses is that the fuse was represented to
be a time-fuse. The fact that the fuse was "instantaneous" con-
stituted a trap for the respondent, and was extreme negligence on
the part of the appellant company: *Anglo-Celtic Shipping Co. Ltd.*
v. Elliott and Jeffery (1926), 42 Times L.R. 297; *George v. Skiv-*
ington (1869), L.R. 5 Ex. 1; *Dean v. McCarty* (1846), 2 U.C.R.
448; *Sincennes-McNaughton Line Ltd. v. The King*, [1926] 2
D.L.R. 633; *Ross v. Dunstall* (1921), 62 Can. S.C.R. 393; *Wright*
v. London and North Western Railway Co. (1875), L.R. 10 Q.B.
298; *Johnson v. Lindsay & Co.*, [1891] A.C. 371; *Lewis v. Bou-*

tilier (1919), 52 D.L.R. 383, at p. 387; *Beven on Negligence*, 3rd ed., p. 483.

Bowlby, in reply. In all the cases cited by the respondent the attention of the defendant had been called to the fact that the article causing the injury was dangerous or defective. Here the evidence is that the article is the same as that used by all manufacturers of fireworks—with instantaneous fuse.

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June 23. GRANT, J.A.:—This is an appeal from the judgment of Wright, J., after verdict given by a jury, in an action for damages for injuries sustained by the plaintiff and alleged to have been caused by the negligence of the defendant company. The jury found a verdict for \$2,000 damages, and answered certain questions submitted to them by the learned trial Judge. They found that the accident to the plaintiff was caused by the negligence of the defendant; and, in answer to the question, "If your answer to number 1 is 'yes,' then state wherein the defendant was negligent causing the accident?" the jury stated: "We believe that this mine according to evidence was defective as it didn't give the results as expected."

This answer being deemed unsatisfactory, the learned trial Judge sent the jury back in order that they might furnish an explanation of it. Whereupon the jury furnished the following supplementary answer:—

"Explanation of answer to question number 2. We find that the mortar should have had a larger base and also a time-fuse attached to mine, and also the mine didn't explode and throw stars from 20 to 50 feet as should of done according to evidence."

As the jury was required to state wherein the alleged negligence "causing the accident to the plaintiff" consisted, it is manifest that the third ground above mentioned, namely, that the mine did not explode and throw stars as it should have done, while it may be an indication that the mine was defective and not according to contract, yet quite clearly does not shew any negligence causing injury to the plaintiff. The failure of the mine to throw stars cannot, by any stretch of imagination, be deemed to have caused the plaintiff's injuries. It might conceivably be evidence of a breach of contract as between the defendant company and the musical society with which the defendant had contracted to supply certain fireworks, etc.; but the plaintiff's action is founded on negligence, and it is frankly admitted that there was no privity of contract between the plaintiff and defendant.

The other two grounds given by way of explanation to the

App. Div. answer to question No. 2 require further consideration, for which
1930. a brief statement of the facts is essential.

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By writing dated the 21st June, 1929, the defendant company entered into a contract with the Hanover Musical Society whereby, in consideration of the sum of \$200, the company agreed to supply a fireworks display at Hanover, on the evening of the 5th August, 1929, sending an expert to take charge of the display and paying freight on the goods shipped. The display was to be according to a programme submitted. The society was to furnish suitable buildings for storage and for certain preparatory work, and to provide lumber and help required by the expert, whose railway and hotel expenses were also to be paid, and undertook to see that the company's expert would not be hampered or interfered with by the public during the arranging and discharging of the display. The goods ordered and covered by the contract were shipped by the defendant company to Hanover on the 29th July. On the 31st July, the chairman of the programme committee of the society wrote to the defendant company (exhibit 3):—

“Hanover, July 31st, 1929.

“T. W. Hand Firework Company,
Hamilton, Ontario.

“Attention Mr. Hand.

“Dear Sirs: In connection with our tattoo on August 5th, we are having the Grey Battalion put on a sham battle in the evening right after the bands march to the tattoo-lights.

“The captain of this company tells me that he should have one dozen large firecrackers that they can throw out from behind the barricade towards the on-coming army. He has asked me to get some suitable firecrackers for this purpose. If you have something that would answer this purpose then please send one dozen. These firecrackers would have to be of such a nature that they would make a loud report when they go off, but they would have to be safe so that they do not burn any one that stands near. A lot of people will be quite close.

“Yours very truly,

“J. Kalte,

“Chairman of Programme Comte.,

“Hanover Musical Society.”

There does not appear to have been any letter written in reply to the above communication, but certain goods were shipped to the society pursuant to the letter, as listed in exhibit 4.

It appears from the evidence that the defendant informed the chairman of the society's committee that the goods requested by exhibit 3 were not altogether suitable for the purpose expressed

in the letter, and those set out in exhibit 4 were shipped by arrangement with the chairman of the society. It should be noted that, according to the letter (exhibit 3), the intention apparently was that the members of the company of militia should throw out the firecrackers themselves. At least there is no suggestion anywhere in the letter that the defendant company's expert would be expected personally to take charge of or have anything to do with the setting off of those articles which were being ordered for the purposes of the sham battle.

Among the articles so furnished for such purpose was a mortar, a duplicate of which is put in as exhibit 12. This mortar is in the form of a cylinder, having the lower end closed and the upper end open. It was intended to be sunk in the ground with the open end upward and the bombardment mine (exhibit 13) was to be placed in the mortar and pushed down to the bottom. In the present case, according to the evidence, the mortar was sunk in the ground so far as to leave only $2\frac{1}{2}$ or 3 inches extending above the surface, and the evidence of the plaintiff and others was definitely to the effect that the earth was packed firmly and securely about the mortar so that it was held firmly in its place. The mine consisted of an ounce and a-half of gunpowder enclosed within a paper bag and having mixed therewith a number of small pieces of a chemical or other combustible material, and from the top or mouth of the mine protruded a piece of fuse probably about 15 or 16 inches in length. This fuse extended out of the top of the mortar so as to enable the mine to be exploded by the ignition of the fuse. For the purpose of supplying the ignition a port fire-stick (exhibit 15) was supplied. This consisted of two rocket sticks, approximately 44 inches in length, wired together in such a manner as to leave an opening between them at one end into which the port fire itself (exhibit 14) could be inserted. One end of the port fire was intended to be inserted in the cleft between the two sticks and was held in position by the pressure of the latter. As the port fire was to be so placed at an obtuse angle with the stick, if the operator held the stick by the extreme end there might then be not only the length of the stick but at least a portion of the length of the port fire and the length of his arm between the body of the operator and the fuse which he was to ignite with the port fire. If the lighting were properly done, there should be approximately 6 feet between the body of the operator and the top of the mortar within which the mine was to be exploded.

That the defendant's representative was not intended or expected to set off the fireworks which were to be used in the

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sham battle (including the mine which caused the plaintiff's injury) is evidenced by the fact that some of the members of the company of militia, together with the plaintiff, who had been requested by the officer in command to assist them, were sent over on the previous afternoon to obtain instructions as to the way in which they were to be set off, from Hand junior, the expert who was sent up by the defendant to take charge of the fireworks display. In any view of that phase of the matter, the jury, by their answers, have negatived as a ground of negligence failure to supervise or failure by the expert to set off the mine, so that we are not concerned here with that question. There is a definite conflict of testimony between Hand junior and the plaintiff and others who, like the plaintiff, were obtaining instructions from Hand, as to the nature of the instructions given regarding the manner in which the mines were to be set off, etc. The plaintiff states that Hand instructed him that the fuse which was to be ignited was a time-fuse, and that he would have 9 or 10 seconds after the lighting of the fuse and before the mine would explode, within which to get away to a safe distance. Similar testimony is given by other witnesses.

Hand, on the contrary, swears that he told the plaintiff that the fuse was instantaneous in its operation and that he instructed the plaintiff in the proper use of the port fire and stick, and the evidence for the defendant is to the effect that, if the stick and port fire were properly used, the operator staying at the distance which would thus be made practicable, he would not be in any danger and could not sustain any injury from the explosion of the mine.

Whatever the facts may have been, as to the instructions given, or as to the manner in which the plaintiff did the lighting, he did sustain serious injury when the mine exploded, the most serious part of his injury having been the loss of one eye.

Had the jury's findings been to the effect that the defendant's representative (Hand junior) had been negligent in not giving the plaintiff proper instructions regarding the manner in which the mine was to be ignited and as to the nature of the fuse, as the evidence upon those two points was conflicting, it is probable that such findings could not have been disturbed. Their finding having been, however, that the mine was defective "as it didn't give the results as expected," by which the jury explain that they meant that "the mortar should have had a larger base and also a time-fuse attached to mine," it is necessary to consider whether or not such finding is supported by the evidence, and also whether or not upon the evidence the want of a larger base or of a time-fuse

can be said to have constituted negligence causing the accident, and for which the defendant can be held liable in law to the plaintiff.

The only testimony suggesting that the mortar should have had a larger base was that given by Professor Loudon, who was called as an expert witness on behalf of the plaintiff.

Professor Loudon occupies a position as Professor in Toronto University, lecturing on applied mechanics and structural engineering. His department has to do with the subject of forms of structures, bridges, buildings, foundations, etc. In addition it came out on cross-examination that what he has to do with respect to explosives is to lecture to the Canadian Officers Training Corps on such subjects. His actual experience has been confined apparently to service in connection with military work and the use of high explosives there, and to work of a similar character in connection with construction. A perusal of his evidence does not disclose that he has ever had any experience in respect of either the manufacture or the setting off of fireworks displays. In respect of the latter his experience, if one may judge from his testimony, is rather less than more than that of any one of the majority of the younger generation who have had the handling of firecrackers, sky-rockets, etc. Strictly speaking, he was not properly qualified to give expert testimony upon the question which was involved here, namely the manufacture and use of fireworks.

The opinion of jurists in England upon the value generally of the testimony of experts is thus expressed in Phipson on Evidence, 6th ed., p. 386:—

“Value of expert evidence. The testimony of experts is usually considered to be of slight value, since they cannot be indicted for perjury, are proverbially, though perhaps unwittingly biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories; moreover support or opposition to given hypotheses can generally be multiplied at will.”

The learned author, after giving references to a number of cases decided in the English courts, makes the statement that: “Where the jury accept a mere untested opinion of experts in preference to direct and positive evidence as to facts, a new trial may be granted;” in support of which statement further cases are cited, one of them being a decision of the Judicial Committee of the Privy Council.

The testimony given by this witness upon the need of a larger base for the container or mortar (exhibit 12) is summed up in a general statement made by him, to be found on p. 140 of the evidence, and which reads as follows:—

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"Now about this container itself, I have no hesitation in saying that my impression about the way in which that container was put in the ground is that it was extremely careless; we know in the army what are known as trench-mortars had to be very firmly grounded if you wanted to know where the bomb out of the mortar was going to go. It was a standing joke in the army that you never knew where a trench-mortar was going to fire. If you get some slight vibration in this container, I have no hesitation in saying there is nobody can tell whether or not the container, set in a vertical position, would rock slightly, and a very little vibration would make a great difference in where the explosive effect would go."

In the first place, it will be noted that in his view the container (mortar) was put in the ground carelessly. The evidence shews that this was done by the plaintiff and his associates and not by the defendant company. At the same time it should also be noted that the evidence of the plaintiff and witnesses called on his behalf was to the effect that the mortar was sunk in the ground so as to leave only a couple of inches or so above the surface, and that the earth was packed tightly about the mortar so that it would be held firmly in position.

The next thing that impresses one on reading this statement of the witness is that his opinion appears to be based entirely upon his experience with trench-mortars in the army, in which high explosives only were used, and, as must be obvious, under conditions utterly unlike those which obtained in the case before the Court.

He then goes on to state that, "if you got . . . vibration in this container . . . nobody can tell whether or not that container, set in a vertical position, would rock slightly, . . . and a very little vibration would make a great difference in where the explosive effect would go." In other words, if you got vibration, no one can tell whether or not the mortar would rock slightly, and if it rocked slightly you could not tell where the explosive would go.

There is no evidence whatever that there was any vibration in the mortar; there was no evidence whatever that the mortar, which was set firmly in the ground in a vertical position, did rock slightly or otherwise. In order therefore to support the answer of the jury that the mortar should have had a larger base, as there is no evidence to shew either that there was any vibration in the container, or that it rocked even slightly, or that it did not continue in a vertical position, the jury had to assume both of the above as facts without any evidence to support them. It is quite true that a jury is entitled to draw inferences from established

facts, but I do not know of any case in which a jury has been allowed to assume the facts and then draw the inferences from them.

Even though, however, the jury were held justified in the view that the mortar should have had a larger base, that is not conclusive in regard to the defendant's liability in law. As will be seen later, the mere fact that there is some safer method which might have been adopted is not sufficient to support a finding of negligence. This phase of the matter will be discussed after the findings as to the fuse shall have been considered.

Suffice it to state that, in so far as the jury find that the mortar should have had a larger base, there is, in my opinion, no evidence whatsoever to support such a finding. On the contrary, there is evidence given by MacDowell and Hand senior, men of long experience in the manufacture and use of these mortars, that, not only are they the kind manufactured by all those engaged in the manufacture of fireworks, but that they themselves have been manufacturing and using them for many years and have never had an accident.

MacDowell has been engaged in the manufacture of fireworks for 28 years, 22 of them with the defendant company, and 6 years in his own business. For the latter 10 years of the 22 spent with the defendant company he had been superintendent in charge of its manufacturing. He states that, if the plaintiff had used the stick and port fire to ignite the fuse attached to the mine in the mortar, standing back at the length of his arm and of the stick, he could not possibly have been injured as he says he was. Not only have they never had an accident from one of these mines, but, he states on p. 253, he had never even heard of such an accident. The instruction to sink the mortar in the ground and to pack the earth firmly about it is given, he states, in order to make perfectly sure that there will not be an accident even with careless handling. He states that he himself has set off hundreds of them, without their being buried at all. He gives the Toronto Fair as an instance of this, stating that they very seldom bury a mortar for firing mines in the fireworks at that exhibition. The practice followed there is merely to stand them up 12 in a row nailed to a board and about a foot apart. He would then use the ordinary stick and port fire, such as was supplied for use in the present case, and then walk along and fire the dozen mines one after another. He states further that he has personally fired such a mine without the mortar being even nailed to the board but just standing upright (p. 254). The effect was that the mine went straight up, and the recoil afterward would upset the mortar, but

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would not affect the direction of the explosive effect. On cross-examination he tells of an experiment which he made with one of these mortars and mines, in which he merely stood the mortar on the ground with a stone on each side to keep it from rocking over. In this experiment, at the height of 5 feet from the ground, the stuff that came out of the mortar spread only to a diameter from 18 to 24 inches. In other words, none of the material had spread farther than 12 inches at the outside from the central point at the height of 5 feet.

The evidence of Hand senior, the president of the defendant company, is to the same effect. He had been engaged in the manufacture and sale of fireworks since he went to work for his father at the age of 12 years. The business which he subsequently took over from his father had been established by the latter in 1874. He had been through all the different grades of the business, including the manufacture, and also the setting off of fireworks at displays. Their firm had been engaged in the manufacture of this type of bombardment mine, that is including both mortar and mine, as long as he could remember; he states that he was quite safe in saying positively that they had been so engaged since 1888, when he took charge of the business. He further states, as a result of his long experiences both in manufacturing and in setting off these mines, that it would not be possible for the plaintiff to receive injuries if he used the stick and port fire to ignite the fuse, at the same time standing back as he said he did.

Not only was there no evidence to shew that the setting off of one of these bombardment mines by the proper use of the stick and port fire was attended with danger to the operator, but on the contrary the only evidence adduced was to the opposite effect.

The plaintiff's evidence as to their taking from the hut the bombardment mines and other materials which they were to use in connection with their sham battle, and also as to the digging in of the mortar and mine in question, will be found on pp. 91 and 92, and again at 98. He states that they dug a hole in the ground and placed the mortar in it and filled around the mortar with earth and made it tight, leaving about 2 inches of the top above the surface, and that the fuse from the mine stuck out to the left. In answer to the learned Judge, he, at p. 92 (line 7), stated that they packed it in tight all around. At the bottom of p. 98 he repeats the above statement as to the depth to which the container was buried, and as to the earth being packed around it tightly, and also states that the container was pointing straight up.

Paterson, the lieutenant in command of the company of militia, gives similar testimony on pp. 26 and 39. He also states

on p. 27 that he got Mr. Hand junior to come and inspect the work after the mortar had been placed, and that Hand said they had made a good job of it. He also says, on the same page, that after his inspection Hand "went back to his own work at the fireworks." On p. 22 he tells of their going to Hand to obtain instructions as to the placing of the mine and how it was to be dug in, etc. On p. 32 he states that Mr. Hand "was working on his own display of fireworks." He makes it quite clear that it was understood that they, and not Hand, should have charge of the setting off of these bombardment mines, etc., in connection with the sham battle. Evidence to the same effect was given by other witnesses: Scheldroth (pp. 75 and 76); Parker (pp. 47 and 49); Sewell (pp. 63 and 64). The plaintiff on p. 93 of the evidence speaks as to the inspection having been made by Hand junior and that the work they had done met with his approval.

The evidence of the witness Loudon regarding fuses is exemplified by his statement on p. 147. He there tells about the army practice as to time fuses and instantaneous fuses, and speaks of the instantaneous fuse being very dangerous to use by itself. On p. 150 he compares the army type of fuse with the commercial type of fuse, and on this page, at line 16, in answer to the question, "Can you tell us anything about commercial fuses in general," he replies: "I have had very little experience with commercial fuses; at the beginning of the war I did purchase some for instruction purposes, but I found they were not sufficiently accurate; we did not use them." At the bottom of this page he expresses the opinion that there is no practice in the use of commercial fuses that is at all to be compared with the army practice. The testimony of this witness in regard to the use of commercial fuses was so indefinite and unsatisfying, that the counsel endeavoured to persuade the trial Judge to allow him to use text-books, to supplement his testimony, which the learned trial Judge quite properly refused to permit. On p. 154 he said that he had seen commercial fuses used in commercial practice, but he never used them if he could help it. On p. 155 he gives the following testimony:—

"Q. You have never seen this fuse? A. I have seen it. I have never used it.

"Q. You have seen it used by whom? A. In letting off fireworks.

"Q. It is the fuse the fireworks companies use generally? A. I think it is.

"Q. I don't suppose there is a fireworks company in the world that uses anything different from this easily made fuse? A. I could not tell you.

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"Q. Did you ever hear of one? A. No."

When recalled, in answer to questions, some of which were put by the learned trial Judge, he gives the following testimony (p. 283) :—

"His Lordship: With gunpowder have you had any experience? A. Yes.

"Mr. Robertson: Have you had much experience? A. I think I have. I have handled it a great deal *in firearms* and *in blasting operations*.

"His Lordship: With anything like that coming out of the mortar or anything like that have you had any experience with the action of gunpowder? A. In this type of thing I would not put it in that.

"His Lordship: Of course you do the commercial—not a fancy fireworks man at all? A. Yes."

On p. 286 he expresses the opinion that it should have been a time-fuse and not an instantaneous fuse.

"Mr. Robertson: You heard how Brownlee described—Mr. Hand senior says it would not be possible for him to be injured in that way? A. My opinion is that, with an instantaneous setting off of anything, anything might happen; there should be a time-fuse to enable the man to get away; an instantaneous fuse should never be used with explosives where a man has to go and light it; there should be a time-fuse there to enable him to get away, to allow for his inexperience or whatever it is."

On p. 287, line 17, he approves of the statement of MacDowell as the result of his experiment, to the effect that the spread at the height of 5 feet would be about a foot or so, and finishes his answer with the statement, "but the thing that affects that is this tilting over."

The evidence of MacDowell in regard to the fuse will be found on pp. 249, 250, and 256. He states that this type of fuse is the one that has always been used in connection with that type of mine and that they never use the time-fuse—as he calls it, the slow fuse. Further testimony was given by him on the pages already referred to, namely, 253 and 254, and on p. 256 he states that this type of fuse is the one used by all fireworks companies, and explains that it is necessary to use the instantaneous fuse because of the nature of the fireworks with which they have to be used, these being required to go off at once when fired.

Hand senior gives similar testimony at the bottom of p. 275 and top of p. 276, where he states that no other type of fuse is ever used in these mines. "It is the staple fuse for all manufacturers." On p. 276 he states that the slow fuse is never used

with mines. At the bottom of p. 279 and top of p. 280 he confirms this on cross-examination and explains why the instantaneous fuse is used, namely, because "they want it to go instantaneously" in fireworks displays, and on the same page he states, on cross-examination, that the use of such a mine in a mortar is not attended with any rocking effect or tendency to tilt when it explodes.

The view entertained by the learned trial Judge in regard to the questions of larger base and time-fuse, as suggested by the witness Loudon, is shewn quite clearly at the bottom of p. 262 and on p. 263. The following discussion took place with counsel (p. 262, line 29):—

"His Lordship: Is there any contest here over the fact that these were improper or that they are proper to be used at all? After all, does it not narrow down to the question, was there any negligence in connection with the act of the defendant in giving the instructions? Is not that the whole case?"

"Mr. Robertson: Not entirely, my Lord.

"His Lordship: I should have thought so. Are you going to shew that these are improper things to be supplied?"

"Mr. Robertson: I submit they are improper things to be supplied to the public—these things as manufactured. . . ."

"Mr. Robertson: My contention is that they are quite improperly made.

"His Lordship: Did you raise that in your pleadings?"

"Mr. Robertson: We call it a defective mine.

"His Lordship: This mine?"

"Mr. Robertson: Yes, the one that injured him.

"His Lordship: You didn't attempt to make that out in your case; however go on."

The view of the learned trial Judge in this regard is also shewn very clearly in his charge to the jury on pp. 322, 323, and 324. On p. 322, having regard to the opinion of the witness Loudon that the mortar should have had a larger base, and also that a time-fuse should have been used, the learned trial Judge refers to the fact that this style of mortar had been in use for a great many years "without any mishap," and that this might be considered by the jury evidence that the materials employed, etc., were reasonably safe for the purpose, and he goes on to state that "it is not required of the company manufacturing explosives or anything else that they should have the very latest or the very safest designs. They are only to have designs that are reasonably safe. Were it otherwise, a man would be obliged every time a new invention came out to change his whole method or change his

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whole works and adopt the newest. That is not the law. All the law requires is that they should use appliances that are reasonably sufficient and safe for the purpose. These have been made for a great number of years; they are made for fireworks. Professor Loudon's experience is largely army experience and experience in construction, blasting, and that sort of thing. It may be that in use in the army and in engineering works it would be undoubtedly proper to have a base on the mortar, and so made more secure. That is not the test. The test is whether it was reasonably safe for the purpose for which it was used, namely, the discharging of fireworks."

He then goes on to deal with Professor Loudon's suggestion that a time-fuse should be used, and, after commenting upon the same, he suggests: "Is there anything in the evidence that would justify a finding that a time-fuse should be used; it may have been safer, but, as I have already said to you, that is not the test. The test is, was this fuse reasonably safe for the purpose for which it was intended?"

And on p. 344 he comments upon the significant fact that no manufacturer or person who had to do with the manufacture of fireworks had been called upon the part of the plaintiff to say that it was usual to use a time-fuse; and states that they should judge the fuse on the basis of its being used in the operation of fireworks, and not in engineering or blasting or anything like that.

It is quite manifest from the language used by the learned trial Judge that he did not consider the testimony given by Professor Loudon such as would justify the findings which have been made by the jury in regard to the mortar and the fuse.

That the opinion of the trial Judge, who heard the evidence and saw the witnesses, is of material value when considering the question whether or not findings of the jury are founded upon the evidence, is shewn by the course followed by the Judicial Committee of the Privy Council in *Aiken v. McMeckan*, [1895] A.C. 310, in which case the Board reversed an order of the full court of the Supreme Court of Victoria, and set aside the finding of the jury as being against the weight of evidence. That was a case in which the jury apparently acted upon the expert medical testimony, rather than upon the testimony of persons as to their actual experience in dealings with the testator. The view of the Judicial Committee is succinctly expressed at the foot of p. 316 and top of p. 317, in the following language:—

"The disproportionate amount of attention given to the medical evidence, which as above observed bears rather on the probable capacity of the testator than on his actual capacity as ex-

hibited in action, was calculated to divert the attention of the jury from the real issue. On these grounds their Lordships held that the verdict is contrary to the evidence to such an extent as to call for a new trial."

Corby v. Foster (1913), 29 O.L.R. 83, is a case in our own Courts, in which the above was cited and followed (*vide* p. 91).

As already intimated, in my opinion, the finding of the jury in regard to the mortar was pure speculation, without any foundation in the evidence upon the record. For that reason, such finding cannot stand and will not afford any support to the judgment.

The finding that there should have been a time-fuse attached to the mine has for its support only the opinion expressed by the witness Loudon, who admitted frankly that he had very little, if any, experience in the use of commercial fuses, and had had no experience whatever with respect to the manufacture and use of fireworks such as were in use on the occasion in question. In opposition to this, there is the testimony of men of many years' experience in the manufacture and use of fireworks and displays of a like character to that in question, who state that this fuse is the one in universal use by all manufacturers of fireworks, that it is invariably used in mines of this description and for such purpose, and that in all the years of their experience they had never had a mishap resulting from its use, nor had they ever heard of one. That being the state of the evidence upon the record, in my opinion the finding of the jury that there should have been a time-fuse is (to use the language of the Judicial Committee) "contrary to the evidence to such an extent as to call for a new trial."

Whatever may be the view in that regard, I think that it is clear law that the finding of the jury that there should have been a time-fuse is not a finding of such negligence on the part of the defendant as will in law render the defendant liable in damages to the plaintiff.

It was stated in Beven on Negligence, 3rd ed., p. 614, that "the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business." Whether or not this statement should be accepted in its widest application may be open to question. I note that it was omitted by the author in a subsequent edition of the text-book. However, the above quotation was given by Smith, J., in *Winnipeg Selkirk and Lake Winnipeg Railway Co. v. Pronck*, [1929] S.C.R. 314, at the bottom of p. 337. In that case, the jury having found against the railway company in respect of the head-light in use on its cars, the finding was set aside upon the ground that the jury had required from the

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defendant company a higher degree of care as to the efficiency of its head-lights than was required by law; that is the degree of care which a reasonable man would exercise under the circumstances. As was stated by Smith, J., on the same page (337): "These lights are the standard equipment of similar cars all over this continent, according to the only evidence offered. . . . I am therefore of opinion that the defendants in having on the car a head-light of the power and efficiency in general use for the purpose on this continent, according to the uncontradicted evidence in the case, discharged their duty to have a head-light of reasonable efficiency under the circumstances."

In the case at bar, as already stated, the fuse furnished by the defendant was the fuse in general use by all manufacturers of fireworks displays, and there is not upon the record any suggestion to the contrary.

The cases bearing upon the questions of law involved in this case are reviewed by Hamilton and Lush, JJ., in *Blacker v. Lake and Elliott Ltd.*, 106 L.T.R. 533. The head-note reads (in part) as follows:—

"The manufacturer of an article dangerous in itself has a duty to the person to whom he supplies it to warn him of its character, and a breach of that duty may render him liable to the recipient, or to a third person into whose hands he ought to contemplate it may come, if he is injured whilst using it. The manufacturer of a dangerous article, the nature of which he has disclosed or the danger of which is apparent on the face of it, is under no obligation to a third person who is injured owing to its imperfect manufacture."

The article in question in that case was a brazing lamp manufactured and supplied by the defendants to a retail dealer, from whom it was purchased by the plaintiff. The lamp exploded. It was manifest that the lamp was a dangerous article by reason of its nature and the use which had to be made of it, and that it was dangerous was known to the plaintiff. The law regarding the rights of third persons in such cases is laid down very clearly by Lush, J., on p. 540. The following are quotations from the views there expressed, after the learned Judge had reviewed the various decided cases:—

"In order that a stranger to a contract may maintain an action in regard to a defective chattel by which he has been injured, he must, in my opinion, bring his case within one of the following three classes of cases.

(The first case given is where there has been fraud.)

"The second case in which the vendor may be liable is when the chattel itself belongs to that specific class of things which are

noxious or dangerous in themselves. In such a case, if the vendor sells the chattel to one person contemplating or knowing that it will be used by another, he is under a duty towards the person who he knows will use it not to misrepresent its real nature."

(He then refers to this view as expressed by Collins, M.R., in *Cavalier v. Pope* (1906), 95 L.T.R. 65, [1906] A.C. 428, in which latter report Lord Atkinson is reported as citing the view thus expressed with approval.)

"If, therefore, a person dealing with an article of a dangerous nature which he knows to be dangerous hands it over to somebody else who is ignorant of its true nature without warning him, he commits a breach of duty not only to the person who contracts with him, but to all the persons who to his knowledge may use it. That is a duty which he discharges if he once warns the recipient of the chattel, and he only owes that duty if its real nature is not apparent on the face of it. If it is found, therefore, as in the present case, that the real properties or qualities of the chattel are apparent or known to the person to whom it is handed over, there is no further duty on the vendor with regard to it than there is in regard to anything else. He is not handing over something and misleading the recipient as to its character, but he is handing over something which is known to be of the character which it actually possesses.

"The third class to which I have alluded is that class of cases in which the thing supplied is in itself a public nuisance. In such a case the person who is responsible for the nuisance is liable to any person who is specially damaged. The three cases I have mentioned are, so far as I know, the only cases in which a duty exists on the part of a vendor of a chattel towards a person with whom he has never come into any relationship, and between whom and the person using the chattel there is no contract."

The learned Judge then goes on to refer to a special line of cases such as *Dominion Natural Gas Co. v. Collins and Perkins*, [1909] A.C. 640, in which case it appeared that the defendants installed a gas-plant without a proper safety valve leading to the open air, and the jury found that gas escaped into the room from the safety valve which the defendants, and every person who thought about it, ought to have known should have had its vent outside and not within the room itself. On p. 541 of 106 L.T.R., after referring to the line of special cases just mentioned, he (Lush. J.) proceeds as follows:—

"Now comes this question: Assuming that the vendor of a chattel which does belong to the 'dangerous' class delivers it with a proper warning to the recipient, does he owe any further duty

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to the person who receives it from that recipient, or, where the danger is apparent on the face of the thing, does he owe a greater duty with regard to the manufacture of the article than if it was not a dangerous thing in itself?

"In my opinion he does not. If once he discloses the nature of the chattel he has done all that the law requires him to do. He has discharged his duty, and when that chattel which is obviously dangerous, or is known to be dangerous, occasions injuries to a third person because of its imperfect manufacture, the manufacturer is under no more obligation towards the person injured than the manufacturer of a cart with a defective wheel is under towards a third person who is injured by the wheel coming off. His duty is to warn, and, if that duty has been discharged, no duty to take care in the manufacture of the article is owing except to the person with whom the manufacturer contracts."

If I may so state, without presumption, the above is, according to my reading of the authorities, an accurate statement of the legal position of the manufacturer or vendor under such circumstances. The principles of law above enunciated are clearly applicable to the facts of the case at bar. The plaintiff knew what he was dealing with and knew that care had to be exercised in the setting off of the bombardment mine. He was given, for use in igniting the mine, the port fire and stick which had always been used for that purpose and had so been used without any accident. The mortar and mine, with the fuse attached to the latter, were those which had been in use for a great many years, also without mishap. They were of the nature and description generally manufactured for the purpose by all manufacturers, and there is not a tittle of evidence to suggest either that the defendant had any reason for supposing that the setting off of this mine would be attended with any danger or that the mine itself was in any respect defective or different from those which the defendant and other manufacturers had been making and using without mishap and without injury for a great many years. Under these circumstances, even if the opinion of the witness Loudon were to be accepted in regard to the fuse as entitled to weight, in conflict with and contradiction of the views and experience of the men who had been in the business for many years, yet, in my opinion, there is lacking in this case at least one factor which is absolutely essential in order to establish the defendant's liability; that is, there is no evidence shewing that it was negligence on the part of the defendant (that it failed, as a manufacturer and vendor of fireworks, to exercise reasonable care) in that it did not furnish a time-fuse. Not only had it no reason for anticipating that

there would be any danger in using the fuse supplied, in the manner in which it was intended and directed to be used, but on the contrary its whole experience and practice over 25 or 30 years, and the custom and practice of manufacturers of fireworks generally, were to the opposite effect. It furnished the type of fuse which had been, according to the only evidence adduced upon the point, in constant and general use for fireworks over all those years, and without any accident.

How can it be said that, in so doing, it failed to exercise reasonable care? So to state must mean that the defendant knew or ought to have known that the use, in the manner directed, of that type of fuse, would probably, or at least by a reasonable probability, be attended with danger of accident to the operator. But its knowledge and experience were exactly to the contrary. Based upon these, and upon the knowledge and experience of those engaged in that line of business, it had every reason for believing that the use of the fuse would not be attended with danger, when the directions were observed. In other words, as the defendant, in supplying the fuse, cannot be said to have failed to exercise reasonable care under the circumstances, it was not therein guilty of negligence in law. Upon this ground therefore, in my opinion, the finding of the jury as to the fuse is not sufficient to support a judgment for the plaintiff. The same ground and reasoning are equally applicable with respect to the finding that the mortar should have had a larger base, which is also open to the objection that there is no evidence to support such a finding.

I am also of opinion that the finding of the jury both as to the mortar and as to the fuse is insufficient to establish the liability of the defendant to this plaintiff, upon the ground that the nature of the fireworks and such danger as is commonly attendant upon the use of them were well known to the plaintiff (see p. 115, foot). The defendant owed no duty to this plaintiff for the breach of which it would be liable to him in damages for any defect in the articles furnished, upon the principle outlined by Lush, J. (*supra*). I prefer, however, to place my judgment upon the reasons previously given.

In my opinion, the findings of the jury and the judgment based thereon should be set aside. As the findings of the jury negative any other ground of negligence, and as they do not, in themselves, amount to a finding of actionable negligence, the appeal must be allowed and the action dismissed both with costs.

MULOCK, C.J.O., and HODGINS and MIDDLETON, J.J.A., agreed with GRANT, J.A.

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MAGEE, J.A.:—The plaintiff was seriously injured through some one's negligence. It could not be attributed to pure accident. The jury have found that it was not attributable to his own negligence, and there would be no justification for disturbing that finding. There was, I think, in the evidence sufficient ground for the jury to have found that the bag containing the explosive charge of the so-called mortar was not jammed or packed down to the bottom of the cylinder or tube so as to be driven straight upward on the explosion, but must have been left at or near the mouth of the tube so that its contents were driven outward instead of upward and without the same force, and so the plaintiff was struck. If such was the cause, it would be open to the jury to say whether the defendant company's agent was negligent in not having seen that the mortar was properly charged.

The jury have found that the plaintiff's injury was caused by negligence of the defendant company, but it cannot be said that they have clearly indicated such a defect as I have mentioned.

On the other hand, they may have had some such defect in mind in their last finding, that the mine did not explode and throw stars from 20 to 50 feet, as it should have done according to the evidence. That finding, however, is little more, if anything, than saying that there was something wrong and *res ipsa loquitur*; and, whatever it was, it was the defendant company's negligence. It can hardly be said that the usual rule can be applied, that express finding by the jury of specified negligent acts or omissions excludes the existence of any other negligence. But also it cannot be said that the jury have clearly specified an act or omission for which on the evidence the defendant company should be held liable, whatever may have been in their minds. I should have been better satisfied were a new trial ordered in a case of such serious injury, but I do not feel that it is clear upon the evidence that the defendant company was at fault, and that it should not have judgment as found by the other members of the Court.

Appeal allowed.

[APPELLATE DIVISION.]

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Criminal Law—Search-warrant—Application for Mandamus to Provincial Constable Making Seizure—Duty as to Articles Seized—Duty of Magistrate when Articles Brought before him—Intervention of Attorney-General—Criminal Code, secs. 629, 631—Constables Act, R.S.O. 1927, ch. 125, sec. 31—Absence of Evidence of Demand and Refusal—Dismissal of Application—Costs.

The order of ORDE, J.A. (1930), 65 O.L.R. 218, was affirmed on appeal. *Held*, by a majority of the Court, that it was the duty of the constable who seized books and papers of the defendants under a search-warrant to carry them before the magistrate who issued the warrant or some other magistrate in the same territorial division, as required by sec. 629 of the Criminal Code, and it then became the magistrate's duty to deal with them according to law; that duty is a judicial one, not to be exercised arbitrarily, and the owner of the things seized is entitled to be heard by the magistrate before he decides what disposition is to be made of them.

In this case, the constable delivered the things to the Department of the Attorney-General for Ontario, and they were, by his authority, sent to the Attorney-General for Alberta to be used in criminal proceedings in that Province against the same defendants:—

Held, that they were not dealt with according to law; for the determination of civil rights of any citizen without his being afforded an opportunity of defending them is contrary to the elementary principles of justice.

The constable had no discretion as to the time when he should carry the seized articles before the magistrate; it was his statutory duty to do so within a reasonable time.

Held, also, that there was no adequate remedy for the wrong done to the defendants other than a mandamus requiring compliance with the statute.

But the defendants had not laid the necessary foundation for a mandamus by making a demand upon the constable to perform his duty; and therefore the application for a mandamus was properly dismissed by ORDE, J.A.

Per HODGINS, J.A.:—The application for a mandamus and the appeal should both be dismissed with costs, because: (1) of the want of a proper demand; (2) the provincial constable was in fact a servant of the Crown in Ontario, under the Constables Act, R.S.O. 1927, ch. 125, sec. 31, and owed no duty to the applicants; (3) the practical result of granting a mandamus to him would be useless and improper, as in effect indirectly putting pressure on the Crown, which the Court had no right to do; and (4) to grant it would be inconsistent with the terms on which the defendants were admitted to bail.

An appeal by Solloway Mills & Co. Ltd. and others, the applicants in a motion made before ORDE, J., in Chambers, from the order of that learned Judge (1930), 65 O.L.R. 218, dismissing the application, which was for a mandamus requiring one E. C. Gurnett, a police constable, to comply with the provisions of sec. 629 of the Criminal Code in respect of a certain search-warrant

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issued on the 20th February, 1930, by V. A. S. Williams, a Police Magistrate for the Province of Ontario.

The information upon which the warrant was granted read as follows:—

“The information and complaint of E. C. Gurnett, of the city of Toronto, in the county of York, Inspector C.I.D. Ontario Provincial Police, taken this 20th day of February in the year 1930, before me, the undersigned: the said E. C. Gurnett says: (1) that books of account, ledgers, financial statements, documents, confirmations, share-registers, and all other records, including those set forth in schedule A hereto attached, are being sought on the ground that they will afford evidence that I. W. C. Solloway and Harvey M. Mills, in the years 1929 and 1930, at the city of Toronto, in the county of York, did conspire each with the other or with some person or persons unknown, by deceit or falsehood or other fraudulent means, to defraud the public, contrary to the provisions of section 444 of the Criminal Code of Canada; and (2) that he has reasonable grounds for believing that the said things will afford evidence of the said offence and that they or some part of them are kept in the premises occupied by Solloway Mills & Co., a partnership, and by Solloway Mills & Co. Ltd., the Dominion, Ontario, and Quebec companies of that or a similar name, at 73 Adelaide-street west, 43 Victoria-street, and in the Metropolitan Building, in the city of Toronto, county of York; (3) that the grounds of his said belief are that he has been so informed by a reliable informant, whose name for reasons of public policy he is not at liberty to disclose, and that he personally has seen many of the said things there.

“Wherefore he prays that a search-warrant may be granted to him and all provincial police and Toronto police constables to search the said premises for the said things.”

The information was signed by the complainant and sworn before V. A. S. Williams, Police Magistrate in and for the Province of Ontario.

The warrant issued by the magistrate read as follows:—

“To all or any of the Provincial Police in the Province of Ontario and to all or any Peace Officers and Constables in the said Province.

“Whereas it appears on the oath of E. C. Gurnett, of the city of Toronto, in the county of York, Inspector C.I.D. Ontario Provincial Police, that there are reasonable grounds for believing that books of account, ledgers, financial statements, documents, confirmations, share-registers, and all other records, including those set forth in schedule A hereto attached, will afford evidence that

I. W. C. Solloway and Harvey M. Mills did in the years 1929 and 1930, at the city of Toronto, in the county of York, conspire each with the other or with some person or persons unknown, by deceit or falsehood or other fraudulent means, to defraud the public, contrary to the provisions of section 444 of the Criminal Code of Canada, and that the said things are kept in the premises occupied by Solloway Mills & Co., a partnership, and by Solloway Mills & Co. Ltd., the Dominion, Ontario, and Quebec companies of that or a similar name, at 73 Adelaide-street west, 43 Victoria-street, and in the Metropolitan Building, in the city of Toronto, in the said county of York.

"This is therefore to authorise and require you between the hours of 9 a.m. and 12 midnight to enter into the said premises and search for the said things and to bring the same before me or some other Justice.

"Dated this 20th day of February in the year 1930.

"V. A. S. Williams,

"Police Magistrate in and for the Province of Ontario."

March 21 and April 2. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

A. G. *Slaght*, K.C., and R. H. *Greer*, K.C., for the appellants, argued that a mandamus should be granted to the applicants as asked. The language of sec. 629* of the Criminal Code made it plain that the constable should carry the things seized before Williams or some other Justice in the territorial division, within a

*629. Any justice who is satisfied by information upon oath in form 1. that there is reasonable ground for believing that there is in any building, receptacle, or place,

(a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed;

(b) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or

(c) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant; may at any time issue a warrant under his hand authorising some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division to be by him dealt with according to law.

2. If the building, receptacle, or place in which such thing as aforesaid is reputed to be is in some other county or territorial division, the justice may nevertheless issue his warrant in like form, modified according to the circumstances, and such warrant may be executed in such other county or territorial division upon being endorsed by some justice of that county or territorial division, such endorsement to be in form 2A, or to the like effect.

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reasonable time, to be dealt with by him according to law. The duty of doing so was a judicial duty. Reference to *Rex v. Payn* (1837), 6 A. & E. 392; *Re Roman Catholic Separate School Trustees and Town of Goderich* (1923), 53 O.L.R. 79; *In re Marter and Court of Revision of Town of Gravenhurst* (1889), 18 O.R. 243; *Rich v. Melancthon Board of Health* (1912), 26 O.L.R. 48; Interpretation Act, R.S.C. 1927, ch. 1, sec. 31. There was no other adequate remedy for the wrong done. Reference to 7 C.E.D. (Ont.), pp. 127, 128; Crankshaw's Criminal Code of Canada, 5th ed., p. 747. The applicants had a status to make the application: *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531.

A. W. Rogers, for the Crown, contended that the Crown had taken the books, etc., under the provisions of the Criminal Code, and that once they were so seized the Crown could use them anywhere in Canada where they might be required in criminal proceedings. The writ of mandamus is a prerogative one and not a writ of right, and so the granting of it is discretionary: *Regina v. Churchwardens of All Saints Wigan* (1876), 1 App. Cas. 611; *Re West Nissouri Continuation School* (1912), 25 O.L.R. 550. The appellants were not entitled to a mandamus unless a demand were first made on the constable to perform his duty. This had not been done: *Regina v. Bristol and Exeter Railway Co.* (1843), 4 Q.B. 162. The applicants had no status to make the application: *Regina v. Mayor of Peterborough* (1875), 44 L.J.Q.B. 85; *Regina v. Wimbledon Urban Council* (1897), 14 Times L.R. 146; *Regina v. Directors of the Blackwall Railway* (1841), 9 Dowl. Q.B. Prac. 558; *Re Denison, Rex v. Case* (1903), 6 O.L.R. 104. The writ will not be granted where there is another adequate remedy. Here an action for damages and an injunction might be brought: *Rex v. Master of the Crown Office* (1913), 29 Times L.R. 427; *Regina v. Lambourn Valley Railway Co.* (1888), 22 Q.B.D. 463; *Regina v. Registrar of Joint Stock Companies* (1888), 21 Q.B.D. 131. A mandamus does not lie against the Crown or its servants, and Gurnett was an officer of the Crown: *In re de Bode* (1838), 6 Dowl. Q.B. Prac. 776, at p. 792; *In re Massey Manufacturing Co.* (1886), 13 A.R. 446; *Attorney-General v. Scully* (1902), 4 O.L.R. 394. There was no imperative duty on Burnett to carry the articles before the Justice at once. That would not be a practicable order. The courts in the different Provinces are auxiliary to one another: *Regina v. Bishop of Oxford* (1879), 4 Q.B.D. 525; *Rex v. Hughes* (1914), 28 W.L.R. 559.

Slaght, K.C., in reply, argued that a demand was not necessary where, as here, the demand would have been refused if made:

Halsbury's Law of England, vol. 10, para. 160; *Commissioners for Special Purposes of Income Tax v. Pemsel* (supra).

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June 23. MULOCK, C.J.O.:—This is an appeal from the order of Orde, J.A., dismissing an application for a mandamus requiring E. C. Gurnett, police constable, to comply with the provisions of sec. 629 of the Criminal Code, in respect of a certain search-warrant issued on the 20th February, 1930, by V. A. S. Williams, Police Magistrate.

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On the 20th February, 1930, Gurnett, by virtue of the said warrant, seized a quantity of books and papers, the property of Solloway and Mills, and in their possession, in the city of Toronto, but did not carry them before the said magistrate or any other justice in the same territorial division, as required by the said section, but delivered them to the Department of the Attorney-General for the Province of Ontario, and the same were, by his authority, sent to the Attorney-General for the Province of Alberta to be used in connection with certain criminal proceedings being prosecuted in that Province against the said Solloway and Mills.

The language of the section is plain. It made it the duty of the constable, within a reasonable time, to carry the seized things before Justice Williams or some or one of the justices in the territorial division, and when so carried to a justice it became his duty to deal with them according to law. Such duty is not to be exercised arbitrarily. It is a judicial duty, and the person owning the seized articles is entitled to be heard by the justice before he decides what disposition is to be made of them. He must "deal with them according to law." To deal with them as was done in this case was contrary to law. The determination of civil rights of any citizen without his being afforded an opportunity of defending them is contrary to the elementary principles of justice. *Vis major* in the determination of rights finds no place in our judicial system. It does not appear why the constable did not conform to the statutory duty cast upon him by the section in question. It is binding on every one, whether a private citizen or a public officer.

Counsel for the Crown also argued to the effect that it was discretionary with the constable when he chose to carry the seized articles before the justice. The constable has no such discretion. It is his statutory duty to obey the section within a reasonable time.

As to the argument that the appellants have some other legal remedy and therefore are not entitled to a mandamus, I am aware

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of no adequate remedy for the wrong done here except by mandamus requiring compliance with the statute.

Damages are not, in my opinion, an adequate or appropriate remedy where a financial house has been deprived of the possession of or access to the books and papers connected with the carrying on of its business.

The last point to be considered is whether the appellants have laid the necessary foundation for the relief claimed. The appellants are not entitled to a mandamus unless a demand has been made upon the constable to perform his duty, or unless he has so distinctly refused that the fair inference would be that a demand would be disregarded. I cannot find in the material before us any demand or refusal. Therefore, regardless of the merits of the appeal, it must fail and be dismissed.

MAGEE, MIDDLETON, and GRANT, JJ.A., agreed with the Chief Justice.

HODGINS, J.A.:—Appeal from an order of Orde, J.A., of the 7th March, 1930, refusing a mandamus. There are two questions in this case, one practical and the other legal. The first arises in this way: the books and papers in question were, we were informed, before the seizure under the search-warrant, under the control of the Attorney-General for Ontario, having been produced before him under the provisions of the Security Frauds Prevention Act, 1928, 18 Geo. V. ch. 34, sec. 9. A request came from Alberta for the loan of these books and other books and papers, and those which the Attorney-General then had were replaced in the offices occupied by the applicants, and the search-warrant then sworn out, under which the whole of the books, etc., in those offices were taken possession of by Gurnett. There was a prospective prosecution by the Crown here for conspiracy to defraud the public within Ontario, in respect to which the aforesaid examination was proceeding, and an actual prosecution for a similar fraud or conspiracy in Alberta. The importance of securing the books and papers of the accused so that they could neither be spirited away (as happened in a well known case here in an action by the Dominion Government for sales taxes), destroyed, nor tampered with, cannot be overstated. The books and papers seized were needed for the prosecutions, both in Ontario and in Alberta, and it is quite unwarranted, if I may say so, to describe their seizure as a "trick," when there was a *bonâ fide* design to secure the books and papers for the Ontario as well as for the Alberta prosecutions. To affirm the contrary is to ignore completely the investigation undertaken and in progress in Ontario

for the purpose of laying the information here, which step has now been taken. It was in fact a proper and reasonable thing to do and a most necessary precaution to take.

After the books, etc., were taken back to the office occupied by the applicants and then seized with others under the search-warrant, the authorities of Alberta indicated those which would be wanted in Calgary in aid of the prosecution there. It was for the Attorney-General here to say whether the exigencies of his prosecution or that in Alberta must govern, and if he yielded the point to Alberta it was done, no doubt, because he was not yet ready to lay his information, while the Alberta Attorney-General had done so. And so the direction which Gurnett followed was given by the Attorney-General for Ontario.

The practical question is, what would a mandamus accomplish now, if granted? To order Gurnett to produce them (except those now in Toronto) would be futile. He cannot comply with it because the books have been taken possession of by the Crown here and sent away. *Regina v. Barnardo* (1889), 23 Q.B.D. 305, mentioned in the argument by one of the Judges, was a case of *habeas corpus*, and not of mandamus, and for that reason alone affords no authority here, and certainly its reasoning does not suggest that a mandamus will be granted to produce books and documents where the person ordered cannot comply with it because a superior authority holds them and they are therefore out of his control or direction. In addition to futility, it may be said that the situation at present indicates clearly that neither justice nor common sense demands the granting of the relief. Solloway and Mills, the two men who control all the business and affairs of the nominal applicants (the three Solloway & Mills Limited companies and the partnership) have been committed for trial in Alberta and will be tried there in May. They have had whatever advantage the presence of their own books with the entries therein would have given them in explaining each transaction questioned. They have now surrendered to the Crown in Ontario on the pending charge of conspiracy to defraud the public, and have been let out on bail for long enough to enable them to be tried in Alberta in May. To get the books down here in the meantime, in order to send them back at once so that the authorities in Alberta can use them at the trial in May and in preparation therefor, is so far from being businesslike or reasonable that from every practical point of view a mandamus should not be granted which, if acted upon, would or might cause these books and papers to be kept travelling back and forward and would or might well seriously prejudice the prosecution in each Province, and perhaps embar-

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pass the prisoners should they desire them to aid in explaining their transactions.

On the legal point, if Gurnett's only authority was the search-warrant, or the words of the Criminal Code, sec. 631*, there is room for comment in that he did not comply with the direction to bring the books, etc., before General Williams or some other magistrate and obtain directions as to their detention or destination. It is obvious that there is nothing to require the bringing before the magistrate to be done *eo instanti* with the seizure, or as fast as the conveyance could be made, and under ordinary circumstances the duty should be performed in a reasonable time. This must, I think (if it fell to be determined by this Court instead of the Crown), be such a time as is dictated by the necessities of the occasion and having regard to the "emergent circumstances," which would certainly include the requirements of the Crown in respect to what was actually in process of being done: *Hick v. Raymond & Reid*, [1893] A.C. 22. But I do not think this motion requires a determination or any such nice appraisalment of the language of the Code or of the warrant. The Attorney-General for Ontario did in fact intervene, and he and not the magistrate directed what was to be done with the books. The examination of the books and papers by the Crown officers in Ontario was in fact proceeding when the warrant was issued. Unless, therefore, the exigencies of the case in Alberta were such that the Attorney-General here recognised that Province as having an urgent claim for the use of the books, the examination would have, no doubt, proceeded *de die in diem*. But if, in the interests of justice, those conducting prosecutions in two Provinces for offences by Solloway and Mills arising out of their alleged stock operations, determined that the books should be in the possession of the Crown for use where and when they were most needed, the alleged inconvenience of these two men must unquestionably yield to the public necessity of providing that the prosecutions are not to be hampered and perhaps hamstrung by private claims for the ownership or use of the books and papers in question. The Court is therefore confronted with the fact that, whatever Gurnett's duty was, and it is not so stated in the Code or in the warrant as to make it immediate, the Crown has interposed and comes into Court asserting its right to retain and deal with the books, etc., in question until the prosecutions are terminated. And

*631. When any such thing is seized and brought before a justice, he may detain it, taking reasonable care to preserve it till the conclusion of the investigation; and, if any one is committed for trial, he may order it further to be detained for the purpose of evidence on the trial.

"against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a mandamus will not lie:" *In re de Bode*, 6 Dowl. Q.B. Prac. 776.

If it was the duty of the constable Gurnett to have brought the books, etc., before a magistrate, and he had done so, it must, I think, follow that the powers given to the magistrate as to detention and disposition are not to be exercised blindly or in ignorance, wilful or negligent, of the purpose of the Crown in directing the seizure. On the contrary, it seems to me that it is and would be his duty to acquaint himself with the intention of the Crown in making the seizure and of the necessity or advisability of making a critical examination of the contents of what were seized to ascertain if by them evidence was afforded, one way or the other, as to the offences contemplated or charged. He would then be in a position to decide whether the books, etc., should be locked up and access denied to all, or whether they should be given to the Crown to complete their investigations, or to aid in any prosecution then launched. This inquiry seems to me to be so natural, so reasonable, and indeed so imperative, that I cannot conceive of any magistrate disregarding it. If so, and the magistrate's discretion had been exercised, and he had directed the books and papers to be disposed of in the same way as was actually followed by Gurnett, it could not be said that any injustice had been done or any impropriety had occurred. It must be clearly remembered that the administration of justice is confided to each Attorney-General in his own Province, and that, even if intervention took place too early and not by way of informing the magistrate of the exigencies of the prosecutions, its exercise can hardly be described as either unjust, improper, high-handed, or arbitrary. The responsibility is on the Crown for a proper exercise of its discretion and of its power and duty in or about any prosecution, and is not one which the Court can or ought to question. The collaboration of two Attorneys-General of different Provinces is only what might be expected in a case such as this. If the conspiracy was contrived in Ontario, it might well be that the carrying out of the scheme might take place outside as well as inside Ontario. If the Alberta authorities found such evidence in the transactions which took place there as to justify them in laying a similar charge of conspiracy in Alberta or for illegal acts done there as part of a conspiracy out of Alberta, it must be evident that the books of the accused would be required as most important evidence at any trial or preliminary investigation both in justice to the Crown and in fairness to the accused.

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No demand on Gurnett was in fact made before this application was launched, and in consequence this application should fail. The reason for a specific demand is well stated in *Regina v. Bristol and Exeter Railway Co.* (1843), 4 Q.B. 162, thus:—

“Where an Act of Parliament empowers a company to execute works, and prescribes the manner in which they shall be done, a party wishing to enforce the proper execution by mandamus must, after the work is completed, specifically require the company to perform those things which, according to his view, the Act enjoins.”

The reason of the rule is stated by Patteson, J., in these words:—

“It is contended here, in effect, that no demand was necessary, because it was palpable that what the Act requires had not been done; but that argument would apply to all cases; and, if it prevailed, parties might come here for a mandamus, without having given the least notice of their objections, whenever a railway company had deviated in the slightest degree from the directions of their Act of Parliament. The only circumstance that weighed with me was the notice given to the company while these works were going on, and to which no answer was returned. But I still think they were entitled to be told, before this Court was applied to, that the complainants were dissatisfied with what had ultimately been done.”

In other words, an applicant is bound to state specifically what act or acts he contends should be done so that the person against whom an order is sought will have clear knowledge of what is demanded, and also so that the applicant shall be likewise bound by his specific demand. This rule has never been abrogated. Nor was it shewn that any duty was owing by Gurnett, as a police constable acting under the search-warrant, to these applicants. His duty was to his superior officer or to the magistrate or to the Crown. The statute created no duty between the applicants here and the constable, such as would be enforceable by mandamus, and the existence of such a duty is an essential requirement before a mandamus will issue: *Regina v. Commissioners of Inland Revenue* (1884), 12 Q.B.D. 461. It may well be that if the officer in the discharge of his duty wilfully or negligently performed it, as, for example, in this case if he had carelessly lost the books and papers he had seized or permitted them to be mutilated or defaced, or if he put them wrongfully out of his power, those to whom they belonged might have an action for damages against him, as is implied in sec. 11 of the Public Authorities Protection Act, R.S.O. 1927, ch. 120. But that is not any authority for the position that

the Court will interfere by mandamus in such a case or that that liability takes the place of public duty enforceable by the writ now applied for. In my view, these considerations relieve me from the necessity of inquiring if another convenient or effective remedy is open to the applicants. The case just cited is, however, authority that a petition of right is such a one.

Consequently I would refuse this motion and dismiss this appeal with costs here and below for the following reasons: (1) because of the want of a proper demand; (2) because Gurnett as a provincial constable was in fact a servant of the Crown in Ontario, under the Constables Act, R.S.O. 1927, ch. 125, sec. 31, and owed no duty to the applicants; (3) because I think the practical result of the granting of a writ of mandamus against Gurnett would be useless, and indeed improper (as in effect indirectly putting pressure on the Crown, which we have no right to do directly); and also (4) because to grant it would be inconsistent with the terms on which Solloway and Mills were admitted to bail.

Appeal dismissed (HODGINS, J.A., dissenting as to costs).

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[APPELLATE DIVISION.]

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Criminal Law—Search-warrant—Issue by Magistrate in Alberta for Execution by Peace Officer in Ontario—Endorsement by Magistrate in Ontario—Validity—Criminal Code, sec. 629—Constitutional Law—British North America Act, sec. 91 (27)—Powers of Parliament of Canada.

A magistrate in Alberta, in aid of a prosecution in Alberta, for an offence committed in Alberta, issued a search-warrant, directed to a peace officer in Ontario, requiring him to execute it in Ontario. The warrant was endorsed by a magistrate in and for the Province of Ontario, and a motion made by the defendants to quash the warrant and endorsement was refused by a Judge of the Supreme Court of Ontario:—

Held, on appeal, affirming the refusal, that the warrant, so endorsed under sec. 629 (2) of the Criminal Code, could be executed in Ontario.

The Dominion Parliament has power to authorise peace officers and others to act beyond the limits of the ordinary scope of their provincial duties.

So far as the Parliament of Canada is concerned, the jurisdiction of the magistrates in Alberta and Ontario was established, and also

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that of the peace officer acting under the endorsed warrant; and the Parliament of Canada can, in a criminal prosecution or for the purpose thereof, under sec. 91 of the British North America Act, deal with the personal property of citizens in any Province and authorise its seizure by a constable or peace officer acting under sec. 629.

In re Vancini (1904), 34 Can. S.C.R. 621, followed.

Sections 9 and 15 of the Interpretation Act, R.S.C. 1927, ch. 1, and provisions of the Criminal Code throwing light on the scope of sec. 629, considered.

Judgment of MIDDLETON, J.A., in *Solloway Mills & Co. v. Williams* (1930), 65 O.L.R. 243, approved.

Quære, as to the right of the Court to interfere in this matter, which is part of the administration of criminal justice.

AN appeal by the defendants from an order of GARROW, J., in Chambers, refusing to quash a search-warrant or the endorsement thereon, the warrant having been issued by one Davidson, a police magistrate in the Province of Alberta, and endorsed by V. A. S. Williams, a police magistrate and justice of the peace in and for the Province of Ontario. The warrant directed Gurnett, a police constable, to search for and seize books and documents upon the premises in the city of Toronto of various firms and companies owned or controlled by Solloway and Mills, the defendants.

By consent, the order of MIDDLETON, J.A., in *Solloway Mills & Co. v. Williams* (1930), 65 O.L.R. 243, was to be treated as under appeal to this Court or as abiding the result of the appeal from the order of GARROW, J.

April 4 and 14. The appeal was heard by MULOCK, C.J.O., MAGEE and HODGINS, JJ.A., WRIGHT, J., and GRANT, J.A.

A. G. Slaght, K.C., and *R. H. Greer*, K.C., for the appellants, argued that the search-warrant and the endorsement thereon made by V. A. S. Williams should be quashed. A warrant issued by an Alberta magistrate, to be executed in Ontario, endorsed by an Ontario magistrate, and to be returned to Alberta, cannot stand. It is not maintainable at common law: *Encyclopædia of Laws of England*, 2nd ed., vol. 13, p. 199; nor under the Criminal Code. The issuing of the search-warrant was a judicial act: *Rex v. Kehr* (1906), 11 O.L.R. 517. A justice of the peace is limited territorially by his patent. So, unless the statute specifically gives him more power, he has not got it. And the Code (sec. 629) does not: *Rex v. O'Gorman* (1909), 18 O.L.R. 427; *Rex v. Lynn* (1910), 17 Can. Crim. Cas. 354; *Rex v. Jack* (1915), 24 Can. Crim. Cas. 385; *Rex v. Ward* (1921), 34 Can. Crim. Cas. 311. Reference to secs. 888, 577, 662, and 676 of the Code; secs. 92 (14)

and 91(27) of the British North America Act, and sec. 31A of the Interpretation Act, R.S.C. 1927, ch. 1. Therefore there was no jurisdiction in the Alberta magistrate to issue the warrant, nor in the Ontario magistrate to endorse it.

A. W. Rogers, for the Crown and for Williams and Gurnett, respondents, contended that the warrant and endorsement were valid. The act of issuing the warrant was a ministerial one: *Hetherington v. Security Export Co. Ltd.*, [1924] A.C. 988. The Criminal Code is Dominion-wide, and therefore, unless the scope of a section is cut down, it should be interpreted as Dominion-wide. Wherever the Code intends the scope of a section to be limited by provincial boundaries, it says so. Therefore, when there is no such limitation, as in sec. 629, it is Dominion-wide: *Dyke v. Elliott* (1872), L.R. 4 P.C. 184; *Rex v. Hoffman* (1923), 41 Can. Crim. Cas. 124. Therefore the jurisdiction of the Alberta and Ontario magistrates was established, as well as the authority of Gurnett, a peace officer, in acting under the endorsed warrant.

June 23. The judgment of the Court was read by HODGINS, J.A.:—The present appeal is from the order of Garrow, J., refusing to quash a search-warrant or the endorsement thereon—the warrant having been issued by one Davidson, a police magistrate in Alberta, and “backed” or endorsed by General V. A. S. Williams, a justice of the peace in this Province, where the search-warrant was to be executed. The search-warrant directed the police constable Gurnett to search for and seize some books and documents in the premises of various firms and companies owned or controlled by Solloway and Mills and situate in Toronto. The order of Middleton, J.A., in *Solloway Mills & Co. Ltd. v. Williams* (1930), 65 O.L.R. 243, was, by consent, to be treated as under appeal and as abiding the result of this appeal.

No objection is taken to the information on which the warrant was based, but the argument for the appellants is founded on this question: Can a magistrate in Alberta, in the case of an offence committed in Alberta, issue a search-warrant directed to a peace officer in this Province, requiring him to execute it in Ontario, and in any such case can the warrant, endorsed under sec. 629(2)* of the Criminal Code, be executed in this Province?

*629. Any justice who is satisfied by information upon oath in form 1, that there is reasonable ground for believing that there is in any building, receptacle, or place,

(a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed;

(b) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or

(c) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant;

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So far as the Crown in the right of the Dominion is concerned, the provisions of sec. 629 indicate clearly that, under the authority of sec. 91(27) of the British North America Act, the Dominion Parliament intended that the local jurisdiction of a justice of the peace or police magistrate in one Province could be exercised to the extent of granting a search-warrant, and that, if it was to be executed outside his local jurisdiction, a magistrate in another Province could endorse it, and, if he did, it thus received the necessary local authority for the acts directed by the warrant to be done here.

By sec. 2 of the Criminal Code (subsecs. 2 and 39), the "territorial division" referred to in sec. 629 includes any county or other judicial division or place to which the context applies, and "county" includes any division of any Province of Canada for purposes relative to any purposes of justice in the matter to which the context relates: subsec. 2.

When a justice is satisfied that the place where the search-warrant will be executed is in "some other county," that is "in some other division of any Province of Canada," he may issue the warrant, which, when duly endorsed in that other division, may then be executed there. It seems to me that the description "division of any Province for purposes of the administration of justice" indicates not only a division which by the Criminal Code is explicitly mentioned (see subsecs. 9, 10, 11, and 12), but any of those constituted in each Province by its own legislation as "territorial divisions." Necessarily the "divisions" of any Province must be those so designated by its authority. See R.S.O. 1927, ch. 3; ch. 88, secs. 45 to 50, 84-86, etc.; chs. 90, 91, 92, 93, 94, and ch. 126, as well as chs. 118 to 125.

By sec. 9 of the Interpretation Act, R.S.C. 1927, ch. 1, it is provided that "Every Act of the Parliament of Canada shall, unless the contrary intention appears, apply to the whole of Canada;" and sec. 15 provides that every Act and its provisions and enactments shall be deemed to be remedial, and shall accordingly

may at any time issue a warrant under his hand authorising some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division to be by him dealt with according to law.

2. If the building, receptacle, or place in which such thing as aforesaid is reputed to be is in some other county or territorial division, the justice may nevertheless issue his warrant in like form modified according to the circumstances, and such warrant may be executed in such other county or territorial division upon being endorsed by some justice of that county or territorial division, such endorsement to be in form 2A, or to the like effect.

receive such fair, large and liberal interpretation as will best ensure the attainment of any object of the Act . . . according to its true intent, meaning and spirit.

With these provisions in view it is well to consider certain other sections of the Criminal Code as well as the definition of criminal procedure in order to ascertain the true intent, meaning, and spirit of sec. 629.

The Criminal Code itself throws much light on the scope of sec. 629. Section 577 gives jurisdiction to any Court of criminal jurisdiction in any Province, unless otherwise provided, to try any crime or offence within the jurisdiction of such Court to try, wherever committed within the Province, if the accused is found or apprehended or in custody in the Province.

By sec. 586 it is provided that "All offences committed in any part of Canada not in a Province duly constituted as such and not in the Yukon Territory may be inquired of and tried within any district, county or place in any Province so constituted or in the Yukon Territory as may be most convenient;" and "such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such district, county or place;" and the Court so given this jurisdiction is authorised to "proceed to trial, judgment and execution or other punishment for any such offence in the same manner as if such offence had been committed within the district, county or place where the trial is had."

And by the next section, 587, it is provided that "the several courts of criminal jurisdiction in the Provinces aforesaid, and in Yukon Territory, including justices, shall have the same powers, jurisdiction and authority in case of such offences as they respectively have with reference to offences within their ordinary jurisdiction as provincial or territorial courts."

By sec. 825, "Every person committed to gaol for trial on a charge of being guilty of any of the offences which are mentioned in section 582 as being within the jurisdiction of the general or quarter sessions of the peace, may, *with his own consent, be tried in any Province of Canada, and, if convicted, sentenced by the judge.*"

Section 826: "Every sheriff shall, within 24 hours after any prisoner charged as aforesaid is committed to gaol for trial, notify the judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such judge shall cause the prisoner to be brought before him."

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“(2) Where the judge does not reside in the county or district in which the prisoner was committed, the judge having received the notification and having obtained the depositions on which the prisoner was committed, if any, may forward them to the prosecuting officer with instructions to cause the prisoner to be brought before him instead of the judge, naming as early a day as possible for the trial in case the prisoner shall elect to be tried by the judge, without a jury, and the prosecuting officer shall, in such case, with as little delay as possible cause the prisoner to be brought before him.”

And the Judge can, after trial “pass the sentence of the law on such prisoner, which shall have the same force and effect as if passed by a court having jurisdiction to try the offence in the ordinary way:” sec. 827, subsec. 4.

If a prisoner who is admitted to bail pursuant to sec. 836 does not appear at the time mentioned in the recognizance or to which the court is adjourned, the judge may issue a warrant for his apprehension *which may be executed in any part of Canada*: sec. 836, subsec. 3.

By sec. 653 it is provided that “Every justice may issue a warrant or summons . . . to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases:—

“(a) If such person is accused of having committed *in any place whatever* an indictable offence triable in the Province in which such justice resides . . . ,” or (b) *wherever such person may be*, if he is accused of having committed an indictable offence within the Province.

When we turn from jurisdiction to procedure, it is evident that the compulsion whereby an accused person is brought before the tribunal, as well as the process securing the attendance of witnesses and their books and papers, is not confined to persons or things within the usual jurisdiction of the Court or within the limits of the territory where the witness and his books, papers, etc., are naturally subject to process.

By sec. 662: “If the person against whom any warrant has been issued *cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada*, any justice within whose jurisdiction he is or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the justice who issued the same, shall make an endorsement on the warrant, signed with his name, authorising the execution thereof within his jurisdiction.

“(2) Such endorsement shall be sufficient authority to the person bringing such warrant and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein *and to carry the person against whom the warrant issued when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division.*”

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By sec. 675: “If the justice is satisfied by evidence on oath that any person within the Province, likely to give material evidence either for the prosecution or for the accused, will not attend to give evidence without being compelled so to do, then instead of issuing a summons, he may issue a warrant in the first instance.

“(2) Such warrant may be in form 14, or to the like effect, and may be executed anywhere within the jurisdiction of such justice, *or, if necessary, endorsed as provided in section 662 and executed anywhere in the Province out of such jurisdiction.*”

By sec. 676: “If there is reason to believe that any person *residing anywhere in Canada out of the Province who is not within the Province*, is likely to give material evidence either for the prosecution or for the accused, any judge of a superior court or a county court, on application therefor by the informant or complainant, or the Attorney-General, or by the accused person or his solicitor or some person authorised by the accused, may cause a writ of subpœna to be issued under the seal of the court of which he is a judge, requiring such person to appear before the justice before whom inquiry is being held or is intended to be held at a time and place mentioned therein to give evidence respecting the charge *and to bring with him any documents in his possession or under his control relating thereto.*”

By sec. 974: “If any witness in any criminal case, cognizable by indictment in any court of criminal jurisdiction at any term, session or sittings of any court in any part of Canada, *resides in any part of Canada*, not within the ordinary jurisdiction of the court before which such criminal case is cognizable, such court may issue a writ of subpœna, directed to such witness, in like manner as if such witness was resident within the jurisdiction of the court.”

By sec. 976: “The courts of the several Provinces and the judges of the said courts respectively shall be auxiliary to one another for the purposes of this Act; and any judgment, decree or order made by the court issuing such writ of subpœna upon any proceeding against any witness for contempt or otherwise may be enforced or acted upon by any court in the Province in which such

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witness resides in the same manner and as validly and effectually as if such judgment, order or decree had been made by such last mentioned court."

It is perhaps unnecessary to examine other statutes *in pari materiâ* such as the Opium and Narcotic Drug Act, R.S.C. 1927, ch. 144, and the Ticket of Leave Act, R.S.C. 1927, ch. 197. In both of these will be found provisions indicating that provincial boundaries are not regarded where a search and seizure of narcotics is contemplated or the arrest of a convict is desired.

That the Dominion Parliament has the power to authorise peace officers and others to act beyond the limits of the ordinary scope of their provincial duties is clear.

In *In re Vancini* (1904), 34 Can S.C.R. 621, 626, Sedgewick, J., delivering the judgment of the Court, adopted the following language from the statement in Lefroy's Legislative Power in Canada, p. 510, which is mainly founded on *Valin v. Langlois* (1879), 3 Can. S.C.R. 1:—

"The Dominion Parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion, whether they be officials of Provincial Courts, other officials, or private citizens; and there is nothing in the British North America Act to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers, as to matters which do not come within the subjects assigned exclusively to the Legislatures of the Provinces, or to deprive them of jurisdiction over such matters."

This was followed in *Geller v. Loughrin* (1911), 24 O.L.R. 18, at p. 25.

In *In re County Courts of British Columbia* (1892), 21 Can. S.C.R. 446, it was decided that the Speedy Trials Act (R.S.C. 1886, ch. 175, as amended by 51 Vict. ch. 46) was not a statute conferring jurisdiction but rather an exercise of the powers of Parliament to regulate criminal procedure. It contains provisions prescribing the duties of a Judge, the Sheriff, County Crown Attorney, Clerk of the Peace, and for securing by summons or warrant the attendance of witnesses.

While the construction of the words "the criminal law . . . , including the procedure in criminal matters," as given by Lord Haldane in *In re Board of Commerce Act and Combines Act*, [1922] 1 A.C. 191, 198, 199, may be unduly restricted, there is no doubt that the subject-matters of the sections herein quoted "belong by their very nature to the domain of criminal jurisprudence," and are not merely ancillary thereto, though their pro-

visions might easily be justified as *intra vires* by the application of that doctrine.

To sec. 91 of the British North America Act, to which I have referred, is appended this statement, "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned to the Legislatures of the Provinces."

Mr. Justice Duff in *Livesley v. Hart Co.*, [1924] S.C.R. 605, 608, defines procedure as including "process and evidence, methods of execution, rules of limitation affecting the remedy and the course of the court with regard to the kind of relief that can be granted to a suitor," but not substantive rights.

Halsbury's Laws of England, vol. 9, para. 499, states that "criminal law and procedure" deal with the "nature, prosecution, and punishment of crime."

A glance at the statutes cited in that volume under para. 625(e) will shew in how many cases a search-warrant is used in aid of a prosecution as process therein.

I think it must be quite evident that, while criminal justice must be administered locally, it would be contrary to the spirit of the British North America Act, so far as the division of legislative powers is concerned, if it were held that the right to formulate criminal procedure, which is to apply all over the Dominion, was to be restricted by the territorial or other divisions which limit the jurisdiction of Courts. These are necessarily provincial in constitution and authority.

Process and procedure in criminal matters are different in character and scope from the jurisdiction of Judges, which under the British North America Act they must exercise as members of Provincial Courts, unless invested by the Dominion Parliament with authority beyond the provincial borders. Where the Dominion Parliament confers or imposes on judicial officers the right, power, or duty of adjudicating on criminal offences or of carrying out criminal procedure, the powers and duties so conferred may be exercised in any part of the Dominion unless expressly limited. And this applies equally to officials of provincial courts and peace officers.

In the Code every precaution seems to have been taken to respect territorial jurisdiction, except where it has been deemed either advisable or necessary to extend it. And this extension has, I think, been made so as to bring within its ambit the procedure for securing the bringing of the accused to trial and to the place of

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trial and as well the witnesses and the documents necessary for the due administration of justice.

The conclusion to which I have come is that, so far as the Parliament of Canada is concerned, the jurisdiction of the magistrate both in Alberta and Ontario is established, as also that of Gurnett, a peace officer, in acting under the endorsed warrant; and the considerations which I have discussed carry with them the result that the Parliament of Canada can, in a criminal prosecution or for the purpose thereof, under sec. 91 of the British North America Act, deal with the personal property of citizens in any Province and authorise its seizure by a constable or peace officer acting under sec. 629 of the Criminal Code.

I may add that, having had the opportunity of reading my brother Middleton's judgment, 65 O.L.R. 243, I agree with it and share his doubt as to the right of this Court to interfere in this matter, which is part of the administration of criminal justice.

The motion to quash before Garrow, J., and the motion before Middleton, J.A., should be dismissed with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

LUCIANI V. BRITISH AMERICA ASSURANCE CO.

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Insurance (Automobile)—Destruction by Fire—Loss by Theft not Covered by Policy—Evidence—Onus—Statutory Condition 4—Provisions of Policy—"Accidental" Fire—Right of Insured to Recover for Loss of Truck and Accessories.

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June 23.

An insurance policy issued by the defendant company covered a motor-truck and insured it against fire in the following words: "Section D. The insurer agrees to indemnify the insured against direct loss or damage to the automobile, including its equipment, caused by (a) accidental fire or lightning. The insurer shall not in any event be liable under section D. . . . 3. For loss or damage arising from theft of the automobile or any of its parts." The plaintiff by his written application asked for insurance against fire. The policy sent to him insured against "accidental fire." There was no evidence that the company pointed out to the plaintiff by letter the difference between the application and the policy, as required by the Insurance Act, R.S.O. 1927, ch. 222, sec. 175, condition 4. The truck was apparently stolen and abandoned by the thief; and when found by the plaintiff had been practically destroyed by fire. Later, certain accessories were removed by unknown persons:—

Held, that the policy was to be construed as insuring the plaintiff against loss by any fire.

Held, also, that the company's agreement of indemnity was a promise with an exception; the plaintiff, having shewn that his loss resulted from fire, had established a *prima facie* case, and the onus was on the company to shew that the cause of the loss was within the exception; this it had not done; and the plaintiff was entitled to judgment for the amount of the value of the truck at the time of its destruction and to a reasonable allowance for the loss of the accessories.

Munro Brice & Co. v. War Risks Association, [1918] 2 K.B. 78, and *Munro Brice & Co. v. Marten*, [1920] 3 K.B. 94, applied.

Per HODGINS, J.A.:—The language of the policy does not limit the company's liability to "accidental" fire—an "accidental" fire is one caused by fire, unless the fire itself was caused or procured by the wilful act of the insured himself or some one acting with his privity and consent. Section 3 of clause D of the policy refers to a loss arising from theft, and there was no evidence that the loss by fire arose from the theft, if there was a theft.

ACTION by a policy-holder to recover the amount of insurance-money alleged to be due under a policy of insurance upon the plaintiff's motor-truck.

The action was tried before McEvoy, J., without a jury, at Brantford.

W. T. Henderson, K.C., for the plaintiff.

F. J. Hughes, K.C., for the defendant company.

April 3. McEvoy, J.:—The matters in dispute between the parties turn largely upon the terms of the insurance policy. The policy recites, "Whereas an application in writing has been made

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by the . . . insured for a contract of insurance . . . in respect of the automobile described in the said application and the said application forms part of this contract of insurance and is as follows." After the applicant's name, Peter Luciani, his address in the city of Brantford, and his occupation as a wholesale and retail fruit-man employed by himself at 270 Colborne-street, in Brantford, is set out: "The automobile is and will be chiefly used in Brantford and vicinity, and is and will be usually kept in a private garage at Durant Garage, Dalhousie-street, Brantford, Ontario." Then follows a description of the automobile, and the price is set down as \$2,600. "Item 4. The automobile is and will be chiefly used for commercial purposes. This item is understood to include: (a) Use for transportation of or delivery of and use in connection with loading and unloading goods and merchandise while transacting the insured's business or occupation stated in item 1, and to exclude use (a) for carrying any person or persons or (b) for livery or hire. (c) Use for any other purpose expressly described as follows:" Then follow items 5, 6, 7, and 8, none of which seems to be involved in the present litigation.

"Item 9. This application is made for insurance against one or more of the perils mentioned in sections A, B, C, D, E of this item, but for insurance under that section or those sections for which a premium is specified and charged and on no other and upon the terms and conditions of the insurer's contract of insurance and for the following specified limits and amounts:—

| Insuring Agreements | Perils | Limits and Amounts | | Premium |
|---------------------|---|---|--|---------|
| Section A. | Legal liability for bodily injuries or death. | One person \$5,000 and, subject to that limit, for each person \$10,000 for one accident. | | \$12.00 |
| Section B. | Legal liability for damage to property of others. | Any one accident, \$1,000. | | \$12.00 |
| Section C. | Collision damage to automobile. | Sum payable by applicant in respect of each separate claim \$ | Actual cash value at time of loss or damage. | nil. |
| Section D. | Fire and transportation. | Amount of insurance. Rate \$1,500 \$0.65 | | \$10.40 |
| Section E. | Theft. | nil. | | nil. |

Total Premium \$34.40

Then the next matter that is material is the following, printed in red: "If the applicant falsely describes the property to the prejudice of the insurer or knowingly misrepresents or conceals or omits to communicate any circumstances required by this application to be made known to the insurer, the contract shall be void as to the property insured or risk undertaken in respect of which the misrepresentation or omission is made."

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"Signature of applicant:

P. Luciani."

Then follows insuring agreement: "Now therefore in consideration of the payments of the premiums charged and of the statements contained in the application and subject to the limits, terms and conditions herein stated and subject always to the condition that the insurer shall be liable to indemnify the insured under that section or those sections of the following insuring agreements A, B, C, D, E, for which a premium is specified and charged in item 9 of the application and no other."

Sections A, B, and C seem not to be involved in the disputes in this action.

Section D. "The insurer agrees to indemnify the insured against direct loss or damage to the automobile, including its equipment, caused by (a) accidental fire or lightning or caused by (b) the stranding, sinking, collision, burning or derailling of any conveyance on land or water, in or upon which the automobile is being transported, including general average and salvage charges, for which the insured is legally liable. The insurer shall not in any event be liable under section D (1) for any amount in excess of the actual cash value of the automobile at the time the damage or loss occurs." (2) This exception is not involved. "(3) For loss or damage arising from theft of the automobile or any of its parts."

The following statutory condition is printed upon the policy:—

"6. (1) Unless otherwise specifically stated in the policy, or endorsed thereon, the insured shall not be liable:

"(d) If there is any material change in the nature of the insurable interest of the assured in the automobile, by sale, assignment or otherwise, except through change of title by succession, or by death, or by an authorised assignment under the Bankruptcy Act."

The policy was dated the 30th day of January, 1929, and expired on the 31st day of January, 1930.

The plaintiff was occupied in a fruit business in Brantford. He went to Grimsby on Tuesday the 17th September, 1929, purchased a truck-load of fruit, drove to Kitchener, Ontario, with this load, arrived there about 8.30 or 9 p.m., and placed his loaded

McEvoy, J. truck in the Kitchener market-place at the platform or stand where
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At about 5.30 o'clock on the morning of the 18th September, the plaintiff returned to the place where he had left his truck and the truck was missing. The truck was not under lock and key, although the plaintiff took away with him to his hotel that evening the key which is used to operate the starter in this as in many other classes of cars. Immediately upon the discovery that his car had been taken away from its position upon the Kitchener market, the plaintiff informed the Kitchener police that his car had been stolen. He lodged at a hotel not far from the market-place, but had no person taking care of his fruit or truck while it was standing upon the Kitchener market.

On or about the 20th September, the plaintiff was notified through the police that his truck had been located. With promptness the plaintiff sought to reach the spot where the truck was and succeeded in getting there. He first notified the agent of the defendant company; the agent gave him a letter of introduction to the adjuster or general agent of the company at Hamilton, and the adjuster or agent with the plaintiff went to the spot near Stoney Creek, not far from Hamilton, where the automobile was seen. It had been burned. It was abandoned and in the possession of no one. It was standing on the incline from a mountain road; one wheel was held from rolling down the incline by a block; the lamps, a spare rim, a rack, and certain other articles, mentioned in exhibit 4, which were worth about \$125, were on the truck at the time this adjuster or agent visited the spot where the automobile was seen by the adjuster and the plaintiff. At that time this person who was undertaking to act for the defendant company told the plaintiff not to interfere with any of the accessories or loose articles that were part of the truck, but to leave them exactly as they were until further developments of the case.

Subsequently the defendant company notified the plaintiff that it was not proposing to take any steps in the matter and repudiating liability. Upon this the plaintiff sought to recover the portions of the truck that had not been destroyed by the fire; but, upon attending at the spot where the truck was, he found that it had been shoved down off the roadway, and all the articles that are mentioned in exhibit 4 had been taken away, and the plaintiff was able to realise only \$75 out of the sale of such things as were still available from the burned truck.

Upon the evidence I find that, had it not been for the action of the adjuster or agent of the defendant company in ordering the plaintiff not to remove anything in connection with the burned

truck, the plaintiff would have been able to recover at least \$100 worth of lamps and accessories which he has lost and lost only by the interference of the company's servant. There do not appear to be any other material facts established by the evidence.

The defendant company originally pleaded numerous defences. Examinations for discovery were held, that of the officer—adjuster—of the defendant company on the 27th February, 1930, and of the plaintiff on the 28th February, 1930. On the 8th March the defendant company's solicitors wrote the plaintiff's solicitors waiving the defences set up in paras. 3, 5, 6, and 7 of the statement of defence (see exhibit 1). This leaves as the substantial defences to the plaintiff's claim: (1) an allegation that there was a change material to the risk and a breach of warranty, within the control and knowledge of the insured, if he left the said motor-vehicle on a public street in Kitchener instead of in the garage referred to in the application and policy; (2) a denial that the motor-vehicle was "stolen" or "accidentally burned" or that the plaintiff has any claim whatsoever against the defendant; and (3) that if the motor-vehicle was in fact stolen the claim is not covered by the contract of insurance.

As to the first of these defences, I find as a fact that the plaintiff did leave his loaded truck upon the public market in Kitchener at the platform used for the sale of fruit at that market, and that he left no one in charge thereof, under the conditions hereinbefore indicated. I am not able, however, to hold that this is such an act as avoided the policy, or that affords a defence to the plaintiff's claim. This defence therefore fails.

As to the second of these defences, that the car was not "stolen" nor "accidentally burned," it is the duty of the Court to draw proper inferences from the facts proven. Upon the facts proven in evidence I have no doubt that the load of fruit was stolen outright, and that the motor-vehicle was in any event stolen temporarily. I am not sure whether or not the intention of the thief was only to steal the load of fruit and temporarily steal the car wherewith to move the fruit. I am sure the thief did abandon the car, after he had successfully stolen the fruit, and that was in law stealing the car; and the policy does not cover the plaintiff in respect of loss by theft. However, assuming that the car was stolen, it was from the moment the thief took it from the market-place until after it was burned the plaintiff's car, and was capable of being "accidentally burned;" and if the burning was "accidental" it is *prima facie* within the words of the policy. But the defendant company says that the onus is on the plaintiff to prove that the burning was "accidental," and that it cannot pro-

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perly be inferred from the facts established in evidence that the burning was "accidental." In addition to that the defendant company says that it is relieved from liability by section D, clause 3, of the policy, which says: "The insurer shall not in any event be liable under section D 3 for loss or damage arising from theft of the automobile or any of its parts." There are two inferences therefore that must be made from the facts proven in evidence before the plaintiff can succeed: first, that the burning was accidental; second, that the damage by burning was not damage arising from the theft of the car.

There is much that could be said by way of speculation. It may be said, if the thief was abandoning the car, why should he set it on fire? If he was driving it recklessly and set it on fire, that would be accidental burning. But would that be burning arising out of theft? See Arnould on Marine Insurance, sec. 905a, and particularly at p. 1161.

With regret, I find myself unable to make the inferences upon the facts proven necessary to sustain a judgment for the plaintiff. I say this because, when an honest man pays his premium and suffers an honest loss, I would struggle to give him indemnity.

The action must be dismissed with costs.

The plaintiff appealed from the judgment of McEvoy, J.

May 13. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

Henderson, K.C., for the appellant. The learned trial Judge erred in finding that the onus was on the plaintiff to shew that the fire was accidental. The application, which appears on the first page of the policy and forms part thereof, does not contain the qualification of "accidental," and therefore the insured is not bound by its insertion in the body of the policy. Reference to the Insurance Act, R.S.O. 1927, ch. 222, sec. 175, statutory condition 4; *Rockmaker v. Motor Union Insurance Co. Ltd.* (1922), 52 O.L.R. 553.

Hughes, K.C., for the defendant company, respondent. The policy is not in accord with the application. The plaintiff and the defendant are both bound by the policy because of the qualification of the application by item No. 9 of the policy: *Holdaway v. British Crown Assurance Corporation Ltd.* (1925), 57 O.L.R. 70; *St. Regis Pastry Shop and Baumgartner v. Continental Casualty Co.* (1928), 63 O.L.R. 337. The company is not liable because the fire arose out of the theft, and is therefore not covered by the policy. Once the truck is stolen all damage which occurs until recovered by the owner comes within the exception contained

in the policy. It is not for the respondent to shew that the fire arose from the theft, but for the Court to draw the necessary inference from all the circumstances and to say whether the policy covers this particular case: *Boyle v. Yorkshire Insurance Co. Ltd.* (1925), 56 O.L.R. 564; *Munro Brice & Co. v. War Risks Association*, [1918] 2 K.B. 78, and *Munro Brice & Co. v. Marten*, [1920] 3 K.B. 94; Arnould on Marine Insurance, 10th ed., vol 2, p. 1161, sec. 905b. The respondent is not liable for the parts stolen after the adjuster told the insured not to take the car away, on the ground that the adjuster, an independent contractor, had no authority to bind the defendant: *British Empire Underwriters v. Wampler* (1921), 62 Can. S.C.R. 591, at p. 598.

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June 23. MULOCK, C.J.O.—This is an action upon a fire insurance policy issued by the defendant company to the plaintiff, to recover the sum of \$1,500 for loss sustained by reason of the destruction by fire of the plaintiff's automobile (a truck), and also to recover the further sum of \$200 in respect of accessories, under the circumstances hereinafter mentioned.

In the written application of the plaintiff for insurance, the peril in respect of which he applied for insurance was stated to be "fire," etc. In the policy issued by the defendant company in response to the said application, the peril insured against is described as accidental fire, and to the company's agreement of indemnity is added the qualification that "the insurer shall not in any event be liable for loss or damage arising from theft of the truck or any of its parts."

In para. 2 of the statement of claim, the plaintiff alleges that by the policy in question the defendant insured him in respect of the said truck against loss by fire, and in para. 3 he alleges that by sec. D of the policy the defendant company agreed to indemnify him against direct loss or damage to the said truck caused, amongst other things, by accidental fire; and in para. 4 he alleges that the truck was accidentally destroyed by fire.

The defendant company in its statement of defence sets up various defences, but the only ones pressed before us were: (1) that the peril insured against was damage by accidental fire; and 2 that, if the truck was stolen, the claim was not covered by the policy in question.

The case was tried by McEvoy, J., who held that in order to succeed the onus was on the plaintiff to prove not only that the burning was accidental, but also that the damage caused by the burning did not arise from the theft of the truck, and that the plaintiff had failed to discharge such onus; and therefore he dismissed the action. From this judgment the plaintiff appeals.

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As to the first ground of defence, the defendant's counsel admits that the plaintiff by his written application asked for insurance against "fire." As above stated, the policy sent to the plaintiff insured against accidental fire.

Statutory condition No. 4 of the Insurance Act, being R.S.O. 1927, ch. 222, is as follows:—

"After a written application for insurance, it shall be deemed that any policy sent to the insured is intended to be in accordance with the terms of the application, unless the insurer points out by registered letter addressed to the insured the particulars wherein it differs from the application, in which case the insurer may, within one week from receipt of the notification, reject the policy."

There is no evidence that the defendant company addressed such a letter to the plaintiff, and therefore the policy is to be deemed as insuring the plaintiff against loss by any fire, and not merely against fire of an accidental nature.

The defendant's counsel pointed out that the plaintiff, in para. 3 of his statement of claim, sued for loss caused by accidental fire, and therefore was bound to prove that the fire was accidental. A fire is not the less a fire because it is accidental. Even if there was any force in the point, it is to be observed that in para. 2 the plaintiff describes the cause of action as loss by fire.

The truck was destroyed by fire, and the defendant company is liable, unless relieved from liability by the qualification that it shall not be liable for loss or damage arising from theft.

The facts respecting the theft feature of the case are as follows:—

In the evening of Wednesday the 17th September, 1929, the plaintiff left his truck, loaded with fruit, on the market-square of the city of Kitchener. During the night some one removed it, and on the following Saturday it was found on a side-road some miles distant from Kitchener, practically destroyed by fire. The plaintiff, having been informed of its whereabouts, proceeded to where it was and identified it as his. Accessories of the truck, worth, he says, about \$200, were there, and he desired to remove them, but the company's adjuster of the loss, who was present, forbade him touching them, and he conformed to the adjuster's direction. Later these accessories were removed by unknown persons. Mr. Hughes, for the defendant company, consented that, if the Court held the company liable for the insurance on the truck, it should also be held liable for the loss of the accessories.

In his argument Mr. Hughes supported the view of the learned trial Judge that, before being entitled to recover, the plaintiff must prove that the loss or damage did not arise from theft of the

truck. The language of the company's agreement is as follows:—

Section D. "The insurer agrees to indemnify the insured against direct loss or damage to the automobile, including its equipment, caused by (a) accidental fire," etc.

"The insurer shall not in any event be liable under section D. . . . for loss or damage arising from theft of the automobile," etc.

The rules for determining where the burden of proof lies in actions upon policies of insurance containing exceptions from liability are discussed by Bailhache, J., in *Munro Brice & Co. v. War Risks Association*, [1918] 2 K.B. 78. In *Munro Brice & Co. v. Marten*, [1920] 3 K.B. 94, his judgment was overruled on an inference of fact, but the Court expressed no dissent from his views as to the question of onus. That case was an action upon a policy of marine insurance against perils of the sea "warranted free from capture, seizure, and detention, and the consequences thereof, or any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war," and the question was whether the assured was obliged to shew that the sea peril was not induced by a cause except by the free of capture and seizure clause.

With reference to an action on such a policy, Bailhache, J., says (p. 88):—

"This review of the authorities confirms me in my view that, as the law now stands, when in an action upon a policy of marine insurance the assured has proved that his ship was sunk at sea, he has made out a *primâ facie* case against his underwriters on that policy, and that it is for them to set up the free of capture and seizure exception and to bring themselves within it if they can When the promise is qualified by exceptions the question (is) . . . whether the exception is as wide as the promise, and thus qualifies the whole of the promise, or whether it merely excludes from the operation of the promise particular classes of cases which but for the exception would fall within it, leaving some part of the general scope of the promise unqualified. If so, it is sufficient for the plaintiff to bring himself *primâ facie* within the terms of the promise, leaving it to the defendants to prove that, although *primâ facie* within its terms, the plaintiff's case is in fact within the excluded exceptional class."

Adopting as I do this view of the law, I am of opinion that in the present case the defendant company's agreement of indemnity is a promise with an exception, and the plaintiff, having shewn that his loss resulted from fire, has established a *primâ facie* case, and the onus was on the defendant company to shew,

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if it could, that the cause of the loss was within the exception, but this the company has not done, and the plaintiff is entitled to judgment.

The missing accessories when new were worth about \$125. I think \$100 would be a reasonable allowance for their loss. The truck was worth, at the time of destruction, at least \$1,800, and the plaintiff should be allowed judgment for \$1,500 loss of truck, \$100 for loss of accessories, and costs here and below.

MAGEE, MIDDLETON, and GRANT, JJ.A., agreed with the Chief Justice.

HODGINS, J.A.:—In this case the facts we have to deal with are simple. The plaintiff's truck, loaded with fruit, disappeared during the night from the market-place in Kitchener, where he had left it, and it was found next day practically destroyed by fire on a side-road off the highway and outside Kitchener.

The insurance policy produced by the plaintiff covers the truck in question and insures it against fire in the following words:—

"Section D. The insurer agrees to indemnify the insured against direct loss or damage to the automobile, including its equipment, caused by (a) accidental fire or lightning.

"The insurer shall not in any event be liable under section D:—

"3. For loss or damage arising from theft of the automobile or any of its parts."

Item 9 in the application reads in this way:—

"Item 9.—This application is made for insurance against one or more of the perils mentioned in sections A, B, C, D, E of this item, but for insurance under that section or those sections for which a premium is specified and charged and no other and upon the terms and conditions of the insurer's contract of insurance and for the following specified limits and amounts."

Section D referred to in the application reads thus:—

"Section D. Fire and transportation, amount of insurance, \$1,500. Rate .65 (premium) \$10.40."

It is argued that the terms of sec. D in the policy as quoted above govern, and that, if so, the liability of the defendant is cut down so as to cover only losses caused by accidental fires other than those which arise "from theft of the automobile."

Whether or not such a construction is possible, a question which I shall discuss later, attention must be paid to the statutory conditions endorsed on the policy under the Insurance Act, R.S.O. 1927, ch. 222, sec. 175.

One of these conditions is No. 4, which reads as follows:—

"4. After a written application for insurance, it shall be deemed that any policy sent to the insured is intended to be in accordance with the terms of the application, unless the insurer points out by registered letter addressed to the insured the particulars wherein it differs from the application, in which case the insured may, within one week from the receipt of the notification, reject the policy."

It is admitted that no notice suggesting any difference pursuant to that condition was sent.

The application asks for insurance against the perils "mentioned in section D," namely "fire and transportation," which insurance "is to be upon the terms and conditions of the insurer's contract of insurance." The policy, it is argued for the defendant, limits the defendant's liability to "accidental" fire, and to loss or damage thereby, provided it is not a loss "arising from theft of the automobile."

The limitation, if that is the effect of the language used, cannot, in the face of the statutory condition, prevail over the wider expressions in the application. But the policy does not, I think, bear any such interpretation. An "accidental" fire is one caused by fire, unless the fire itself were caused or procured by the wilful act of the insured himself or some one acting with his privity and consent: *Midland Insurance Co. v. Smith* (1881), 6 Q.B.D. 561, and *per Scrutton, L.J.*, in *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520, 544; while the loss referred to in (3) is one "arising from theft," and there is here no evidence that there was a theft, or that, if there was such evidence, the loss by fire arose from it any more than from the intervention of some party other than the supposed thief or from a cause peculiar to the truck itself.

The law is quite clear that, where liability is limited by an exception, the person endeavouring to escape by virtue of the exception must prove that the facts bring him clearly within it: *Munro v. War Risks Association*, [1918] 2 K.B. 78; *Arnould on Marine Insurance*, 10th ed., vol. 2, p. 1044. This evidence is entirely absent here.

Consequently on all the grounds urged, I think the defendant fails and that the appeal must be allowed and judgment entered for the plaintiff for the amount of his damage as shewn by his proof of loss, with costs throughout.

Appeal allowed.

App. Div.

1930.

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BRITISH
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ASSURANCE
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Ontario cases decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada and reported since the publication of vol. 64 of the Ontario Law Reports.

CHARLESWORTH v. RYAN, 36 O.W.N. 265, affirmed by the Supreme Court of Canada; RYAN v. CHARLESWORTH, [1930] S.C.R. 427.

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KRAUSE v. YORK, 38 O.W.N. 146, reversed by the Supreme Court of Canada, and judgment of McEvoy, J., *ib.*, restored: YORK v. KRAUSE, [1930] S.C.R. 376.

LEFEBVRE v. MAJOR, 64 O.L.R. 43, reversed by the Supreme Court of Canada: LEFEBVRE v. MAJOR, [1930] S.C.R. 252.

LITTLE v. BROOKS AND CANADIAN NATIONAL RAILWAY Co., 36 O.W.N. 268, reversed by the Supreme Court of Canada, and new trial ordered: [1930] S.C.R. 416.

MEAGHER v. LONDON LOAN AND SAVINGS Co. OF CANADA, 64 O.L.R. 600, reversed by the Supreme Court of Canada: LONDON LOAN AND SAVINGS Co. OF CANADA v. MEAGHER, [1930] S.C.R. 378.

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YORKE v. CONTINENTAL CASUALTY Co. OF CANADA, 64 O.L.R. 109, affirmed by the Supreme Court of Canada: CONTINENTAL CASUALTY Co. v. YORKE, [1930] S.C.R. 180.

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